In the Supreme Court of the United States

OCTOBER TERM, 1979

No.

BOARD OF TRUSTEES OF
KEENE STATE COLLEGE, ET AL.,
PETITIONERS,

v.

CHRISTINE M. SWEENEY,
RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit entered on August 21, 1979, subsequent to a remand from this Court for reconsideration.

Opinions Below

The opinion of the Court of Appeals delivered on August 21, 1979, is officially reported at 604 F.2d 106. This opinion also appears in Appendix E hereto. The earlier

opinion of the Court of Appeals delivered on January 4, 1978, which was vacated by this Court on November 13, 1978, was officially reported at 569 F.2d 169 and appeared in Appendix A to the Petition for a Writ of Certiorari docketed with this Court on June 19, 1978, as No. 77-1792.

The original opinion of the District Court for the District of New Hampshire, now again affirmed, was not officially reported but was unofficially reported at 14 FEP Cases 1220. This opinion appeared in Appendix B, first Pet. for Cert., and is reproduced here as Appendix F.

This Court's majority *per curiam* opinion, with separate dissent, (No. 77-1792, November 13, 1978), which granted certiorari, vacated the judgment of the Court of Appeals, and remanded the case to it for reconsideration, has been officially reported at — U.S. —, 58 L.Ed.2d 216, 99 S.Ct. —, and appears in Appendix A hereto. The subsequent order of the Court of Appeals, on December 19, 1978 (not officially reported), remanding the case to the District Court for further proceedings, appears in Appendix B hereto. The ensuing orders of the District Court issued on January 29 and February 20, 1979, which reaffirmed that court's original opinion and findings in all respects, appear in Appendices C and D hereto (neither officially reported).

Jurisdiction

The judgment of the Court of Appeals affirming the District Court's original judgment was entered on August 21, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Questions Presented

Pursuant to Title VII of the Civil Rights Act of 1964, as amended:

1. Whether, in employment discrimination cases under Title VII, an ultimate finding of sex discrimination is to be reviewed on appeal within the constraints of the "clearly erroneous" standard of Rule 52(a), Fed. Rules of Civ. Proc., as in the First Circuit, or under the "independent determination" test followed in the Fifth and Seventh Circuits.

2. Whether on remand from this Court, the Court of Appeals should have given independent consideration to the issue of discriminatory motive.

3. Whether, in reconsidering the issue of discriminatory motive, the Court of Appeals has in fact reimposed on the defendants a heavier burden than *Furnco* warrants. (*Furnco Construction Co.* v. *Waters,* 438 U.S. 567 (1978))

4. Whether the inference of societal bias drawn by the courts below constitutes sufficient proof of discriminatory motive to warrant the courts' setting aside the judgment of plaintiff's peers that she was not qualified for promotion to full professor in 1974-75.

Statutes Involved

The substantive federal statute involved here is Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.,* as amended by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103. The pertinent provision is §703(a)(1), 42 U.S.C. §2000e-(2)(a)(1):

> "*Sec. 703.(a)* It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privi-

leges of employment, because of such individual's race, color, religion, sex, or national origin . . . ."

The procedural question presented here involves Fed. Rules Civ. Proc., Rule 52(a), 28 U.S.C., in pertinent part as follows:

> *52(a) Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58 . . . . Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. . . . If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. . . ."

Statement of the Case[1]

The perplexing question of motivation—whose motivation and how it is to be demonstrated—has been the pivotal proof issue in this individual, academic employment discrimination case from the beginning and through successive stages of appeal. Indeed this Court granted certiorari last term in order to emphasize that *defendants do not have to prove absence of discriminatory motive under Title VII.* While recognizing that proof of motive

[1] Petitioners direct the Court also to the "Statement of the Case" found in the first Pet. for Cert. Attention here is focused on judicial treatment of the motivation question throughout, and on proceedings subsequent to this Court's remand on November 13, 1978.

was critical in a disparate treatment case, the Court of Appeals erroneously stated this was defendants' burden. (E2) In its *per curiam* decision, this Court stated that to require defendants to do so

> "would place on the employer at the second stage the burden of showing that the reason for rejection was not a pretext, *rather than requiring such proof from the employee as a part of the third step.*" (A2, n.1, emphasis supplied)

The District Court originally announced its intention of applying the *McDonnell Douglas* proof analysis. (*McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973)). (F2) However, the District Court's opinion, too, contained language that defendants had failed to prove a "non-discriminatory motive in failing to promote [plaintiff]." (F25, Finding No. 8)

The plaintiff, who had twice been an unsuccessful candidate for promotion from associate to full professor before succeeding on her third try, had alleged she was a victim of sex discrimination. The defendants and petitioners here—who were the college, its trustees, president and two former deans—defended the negative actions on plaintiff's promotion on a number of grounds, but principally through explanation and defense of the professional peer review process itself.[2] Evidence was introduced that absent extraordinary circumstances the determinative promotion decision was made by the annually elected Faculty Evaluation Advisory Committee (FEAC). *See,* Cir. Op., at E4-E5 & n.5; also 569 F.2d, at 172-73; and first Pet. for Cert., at 6-7.

[2] The plaintiff originally alleged other claims, too, but the District Court found only a partial violation under Title VII in the denial of plaintiff's second application for promotion. (F1-F2, F25-F26). This petition deals only with sex discrimination in promotion under Title VII (as did also the first Pet. for Cert.).

Petitioners introduced evidence indicating that the peer committees evaluating plaintiff's qualifications for promotion treated female candidates no less favorably than male candidates.[3]

Despite this showing of FEAC's actions and other evidence, including evidence of plaintiff's comparatively weak qualifications for promotion,[4] the District Court made the following so-called "Specific Findings" in its original decision, which has now been reaffirmed in all respects:

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[3] In 1974-75, the year the trial court found discrimination, FEAC voted unanimously against plaintiff's promotion. However, the committee gave favorable recommendations for promotion (and/or tenure) to five of six women. Plaintiff was the only unsuccessful female candidate in 1974-75. One woman, and only one man, were promoted to full professor. In that year also, FEAC recommended *against* promotion (and/or tenure) for thirteen of twenty-five men. In its recent opinion, the Court of Appeals finally took notice of these evidentiary facts but discounted their significance, saying:

> "This information obviously bears on the question of discrimination, but it does not render the district court's *conclusion clearly erroneous.*" (E13, emphasis supplied)

There is no indication that the District Court ever considered these facts. *See*, discussion of the application of the "clearly erroneous" review to this case, *infra*, at 17, 20-22.

[4] Petitioners showed that the plaintiff was treated as well as, and in some cases, *more* favorably than others (including men) at the college. For example, she was hired at the associate professor rank. Although she had been promoted to this rank at the college where she previously was employed, she had never served in the rank, and at the time of her promotion she had been an assistant professor for only *two* years. Keene State College's own requirement for service as assistant professor was *four* years, and male as well as female candidates were routinely turned down for failure to satisfy this minimum requirement. Because of the college's time-in-grade requirements, the *minimum* rate for promotion from assistant to full professor was eight years. The plaintiff attained full professor in nine and one-half years. Although some faculty members served fewer years as associate professor (and some served longer), only the very exceptional bettered her overall rate. No one testified that the plaintiff was an exceptional or outstanding faculty member. Her own record indicated that she had not published since coming to Keene, and her campus-wide committee activity was limited. (*See*, D.Op., F10; Cir.Op., E6).

> "7. I find that the reason the plaintiff was not promoted in the academic year 1974-75 was because of her sex.
>
> "8. The defendants have not rebutted the plaintiff's evidence that they did not [sic] discriminate against her by reason of her sex and have not proven that they had a non-discriminatory motive in failing to promote her in the academic year 1974-75.
>
> "9. I find that a double standard was applied for males and females in the promotion process. The evidence shows that there was and is a disproportionately small number of women in the high ranks of associate and full professors and particularly in the rank of full professor. . . ."[5] (F25).

The District Court failed, and has yet, to make any subsidary findings of fact about the motivation of FEAC in 1974-75. The court merely summarized without comment the committee chairman's testimony that the plaintiff had a weak case for promotion. (F12, F22) The court also noted without comment the finding of FAC (Faculty Appeals Committee) that it found no evidence to support the

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[5] The District Court apparently concluded that the small number of women in the upper ranks established discrimination in promotion. (F22-F23). Petitioners have repeatedly criticized this inference and the value of the statistical showing on which it is based. *See*, first Pet. for Cert., at 13-15 and Reply Brief for Petitioners, at 8-10. In its recent opinion, the Court of Appeals now concedes that:

> "The absence of women in the upper ranks at Keene State was not projected back in time and tied to ranks in the different disciplines in earlier years. Moreover, the existence of a statistical disparity, while often helpful in establishing a prima facie case of discrimination, does not by itself meet an individual's burden of proving that the reasons given by the employer were pretexts, *Furnco*, 438 U.S. at 579-80." (E11, n.11). *See*, further discussion of methodology of statistical inference, *infra*, at n.17.

plaintiff's charge of sex discrimination when reviewing her case on appeal.[6] (F12)

The District Court did say in its original opinion regarding the defendant Dean Davis:

> "It is true that Dean Davis turned the plaintiff down twice for promotion, but on *both occasions he was acting in accord with the unanimous recommendation of FEAC.* He had previously approved the unanimous recommendation of FEAC that she be granted tenure. *Whatever personal animus* Dean Davis may have had against the plaintiff, there is *no evidence that it was sex based.*" (F13, emphasis supplied)

However, there is no comparable statement *about the motivation of the 1974-75 FEAC* or its chairman, Dr. Quirk. The court's conclusory finding is a generalized one: a double standard in promotion inferred from simple numbers. (F23; F25, Finding No. 9)

Both courts below have expressed great concern with what the District Court called "societal bias". (F16, F24) In their first petition to this Court, petitioners pointed to statements throughout the District Court's opinion which apparently set forth that court's concept of proscribed motivation. *See,* Reply Brief for Petitioners, at 10-13. These statements about male societal bias include the court's restatement of general opinions voiced by an assist-

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[6] The District Court even quoted from the report made by the FAC chairperson, Dr. Janet Grayson, which concluded:

> "Although we did not find evidence to support her charge of discrimination because of sex, we are concerned that she had to endure unprofessional treatment within her department and by the administration." (F12)

FAC's purpose was to look for arbitrary, capricious or prejudicial actions, or for new evidence to warrant reversal of promotion denial. Yet, the District Court did not indicate this internal grievance proceeding was entitled to any weight.

ant professor of sociology at the college, which had no direct relationship to the plaintiff's case.[7]

In their first appeal from the District Court's decision, petitioners argued that unconscious societal bias, as described by plaintiff's witnesses, does not constitute *per se* the purposeful discrimination which the individual plaintiff must demonstrate under Title VII. Petitioners argued that there must also be a preponderance of evidence to indicate that the challenged decision was sexually premised, and that plaintiff's circumstantial evidence, particularly the undifferentiated statistics, fell short of carrying this burden. The Court of Appeals misconstrued this argument as an assertion that the plaintiff must furnish *direct* evidence of discriminatory motive, and responded:

> "The Supreme Court has never said that an individual plaintiff seeking to establish a claim of disparate treatment in violation of Title VII must present direct evidence of discriminatory intent." 569 F.2d, at 175.

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[7] The court noted that:

> "Professor Vander Hagen was one of the key witnesses for the plaintiff, *although she explicitly stated that she made no judgment as to the plaintiff's case.* . . . In her opinion, the entire collegial process of promotion discriminates against women. The process, which she characterized as being run like an 'old boys club,' works best for those who get along with the power structure which, because of historical factors, is dominated by men. In her opinion *there is no awareness by men that they discriminate against women.*
>
> * * *
>
> "On cross-examination, Professor Vander Hagen admitted, in effect, that Keene reflects the traditional societal bias against women. She feels that *women are disadvantaged as a group because of social categories.* . . . Professor Vander Hagen did state that *some men could be educated to understand the problems of women.*" (F15-F16, emphasis supplied)

The court did not note, but the witness did also testify that women can be members of the "old boys club"; she conceded, too, that some men are not members.

The Court of Appeals cited decisions by this Court in *International Brotherhood of Teamsters* v. *United States,* 431 U.S. 324 (1977); *Washington* v. *Davis,* 426 U.S. 229 (1976); and *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973) (distinguishing *General Electric Co.* v. *Gilbert,* 429 U.S. 125 (1976)) to enunciate twin rules regarding proof of discriminatory motive in disparate treatment cases: (1) the plaintiff may rely upon inferential proof of motive, and (2) the defendant must prove absence of discriminatory motive. (569 F.2d, at 177) (This Court, of course, has already rejected the latter statement of the defendants' burden. (A1-A2))

Like the District Court, the Court of Appeals in its first opinion attached great significance to general testimony about societal sex bias:

> "This bias may often be *unconscious and unexpressed,* but its potential for harm is greatest in reaching decisions on the basis of criteria which simply cannot be objectively measured or definitely stated." 569 F.2d, at 179. (emphasis supplied)

Petitioners concluded from this that the lower courts had accepted as a postulate that societal bias existed at the college and then looked to defendants to disprove its existence.

In a petition for rehearing, petitioners attempted to focus the Court of Appeals' attention away from general, unconscious societal bias to the agents who made the challenged decision, the 1974-75 FEAC. Petitioners submitted that although the plaintiff might rely upon inferential proof of motive, the general inference about societal bias could never establish an individual, "disparate treatment" violation of Title VII in the absence of evidence that those who actually made the effective decision against plaintiff's

promotion were moved to action by such bias. (Compare conclusion of District Court about motivation of Dean Davis, at F13.)

The Court of Appeals denied the petition for rehearing, and petitioners subsequently applied to this Court for a writ of certiorari, which was granted without argument on the merits. In the majority *per curiam* opinion, this Court clarified the defendant's burden of proof on the motive issue and remanded the case to the Court of Appeals for application of the proper test. (A2) Petitioners then filed with the appellate court a motion for leave to file additional briefs and make further oral argument in light of this Court's remand.

On December 19, 1978, the Court of Appeals entered an order as follows:

> "Upon consideration of motion for leave to file additional briefs and make further argument to this Court, objection thereto, and response to objection,
>
> "It is ordered that this cause is hereby remanded to the District Court (attention of Judge Bownes, sitting by designation)[8] *for further proceedings and reconsideration* in the light of *Furnco Construction Co.* v. *Waters,* 438 U.S. — (1978)." (B1, emphasis supplied)

On January 29, 1979, without notice to the parties, the District Court issued an order in which it reaffirmed its original opinion and findings in all respects. (C1-C2) The District Court stated that it had "reconsidered and reexamined" its original opinion in the light of *Furnco, supra,* and also "reread *Sweeney* v. *Board of Trustees of Keene State College,* 569 F.2d 169 (1978), and studied

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[8] After hearing this case at the district level, Judge Bownes was subsequently appointed to the First Circuit where he now serves.

carefully the decision of the Supreme Court granting certiorari [— U.S. —, 58 L.Ed.2d 216] (November 13, 1978)." (C1) But, the court apparently did not read the petition for certiorari, or other briefs filed by the parties with this Court, nor did it read the briefs filed on appeal from its original decision.

In the January 29, 1979 order, the District Court made no subsidiary findings of fact to indicate what it considered relevant to proof of purposeful discrimination or pretext. There is no indication that the court even looked into the record to review any evidence. The court merely stated, in recollecting its earlier decision:

> "Plaintiff then proved to my satisfaction that the basic reason for the failure to promote her was because of her sex, that the reasons advanced by the defendants were pretextual, and that plaintiff would have been promoted in the academic year 1974-75 but for the fact that she was a woman.
>
> "My opinion and findings are in all respects reaffirmed." (C1-C2)

Petitioners then filed a request for hearing (subsequently amended to a request for relief under Rule 59(a), Fed. Rules Civ. Proc.) protesting this perfunctory treatment and submitting that they were, in effect, being deprived of substantive due process when their reasons were summarily branded pretextual without explanatory, subsidiary findings of fact. On February 20, 1979, the District Court denied these requests as untimely filed and stated that it had complied fully with its remand from the Court of Appeals for further proceedings and reconsideration. (D1)

Petitioners appealed directly from the District Court's orders to preclude the possibility that the Court of Appeals might similarly interpret its mandate from this Court.

Petitioners submitted that—in view of (1) the nature of this Court's remand for application of the proper test; (2) the District Court's failure to make subsidiary findings of fact specifically about FEAC's motivation; and (3) the District Court's reaffirmance of its original decision containing language which had been specifically rejected by this Court (*See,* Findings Nos. 7-9, cited, *supra,* at 7.) —they were entitled to judicial analysis by the Court of Appeals of the factual underpinnings of the finding of discrimination.

The Court of Appeals' response was to (again) apply the "clearly erroneous" test to the District Court's decision:

> "We indicated that we followed the clearly erroneous standard of Fed. R. Civ. P. 52(a) in our first *Sweeney* decision [*supra*]. Defendants now urge us to abandon that standard in Title VII cases on the ground that a 'factual' finding that a plaintiff was denied a promotion because of her sex is equivalent to a finding on the ultimate legal issue of discrimination. This argument has persuaded some circuits that appellate courts should make an independent determination of the question of discrimination. . . . [citations omitted] We are not inclined to that approach." (E3, n.2)

Thus, although the Court of Appeals has now addressed the question of pretext, the third stage in the *McDonnell Douglas* analysis, it has done so in the admittedly biased context of a "clearly erroneous" review.[9] For the first time in this case, a court has looked at the reasons given

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[9] In its first review of this case, the Court of Appeals noted that "several of the fact findings in this case favored Dr. Sweeney and the 'clearly erroneous' standard works to her advantage". 569 F.2d, at 176, n.12.

for the plaintiff's failure to be promoted in 1974-75, but its examination has been for the express purpose of upholding the lower court's *decision,* and has been cast in terms of unconscious sex bias. (E12-E14)

This case is at a curious impasse. After lengthy appeal proceedings and repeated arguments, and despite this Court's remand last term, it has yet to receive the kind of analysis of purposeful discrimination called for by *McDonnell Douglas* and *Furnco, supra.*

Reasons for Granting the Writ

I. This Court Should Grant Certiorari To Harmonize Appellate Practice in Reviewing the Ultimate Finding of Discrimination Under Title VII.

The Court of Appeals acknowledges in its recent decision that other circuits treat the finding of discrimination as an ultimate finding, subject to review free from the constraining limitation of the "clearly erroneous" test, Fed. Rules Civ. Proc., Rule 52(a). The Fifth and Seventh Circuits, for example,

> "make an independent determination of the question of discrimination and apply the clearly erroneous standard only to the district court's findings of subsidiary facts. *E.g., Stewart* v. *General Motors Corp.,* 542 F.2d 445, 449 (7th Cir. 1976), *cert. denied,* 433 U.S. 919 (1977); *Causey* v. *Ford Motor Co.,* 516 F.2d 416, 420-21 (5th Cir. 1975)." (E3, n.2)

The Court of Appeals here explains its own practice as follows:

> "This circuit has applied the clearly erroneous standard to conclusions involving mixed questions of law

> and fact except where there is some indication that the court misconceived the legal standards. [citations omitted]. We see no reason to depart from this course in discrimination cases; the opportunity for first-hand observation may be especially important in one such as this, where the issue is whether 'personality' reasons were sexually biased."[10] (E3-E4, n.2)

In *Stewart, supra,* the Seventh Circuit states its standard of review in these terms:

> "In reviewing the district court's decision, we are bound under Fed. R. Civ. P. 52(a) to accept findings of fact unless they are clearly erroneous. *Prince* v. *Packer Mfg. Co.,* 419 F.2d 34, 36 (7th Cir. 1969). The statement that discrimination exists for the purposes of establishing liability under Title VII, however, is as much a conclusion of law as a finding of fact. A distinction must be drawn between subsidiary facts to which the 'clearly erroneous' standard applies, and the ultimate fact of discrimination within the meaning of Title VII, which is the decisive issue to be determined in this litigation. *East* v. *Romine, Inc.,* 518 F.2d 332, 338-39 (5th Cir. 1975). Accordingly, *we will make an independent examination of*

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[10] *But see,* discussion, *infra,* at 25-28. The District Court made no findings specifically about FEAC's motivation, despite requests to do so. If the District Court had made these findings, such as it did about Dean Davis (F13), then petitioners submit *this* would be the type of finding protected by the "clearly erroneous" rule, involving as it does matters of demeanor and credibility particularly within the trial court's purview. However, the District Court appears to base its finding that plaintiff should have been promoted in 1974-75 solely on a generalized inference of societal bias existing at the college. Since no bias is specifically attributed to the members of FEAC, the appellate court here is in as good a position as the trial court to draw its own independent inferences from the record.

whether defendant's conduct constitutes a violation of Title VII.'' Ibid. (emphasis supplied)

Similarly, the Fifth Circuit in *Causey, supra,* states:

> ''There exists . . . a significant distinction for the purpose of applying the clearly erroneous test between findings of subsidiary fact and findings of ultimate fact. *See, Galena Oaks Corp.* v. *Scofield,* 5th Cir. 1954, 218 F.2d 217, 219-20. *Finding a subsidiary fact involves the determination of an evidentiary or primary fact; finding an ultimate fact, on the other hand, 'may involve the very basis on which the judgment of fallible evidence is to be made.' Baumgartner* v. *United States* 1944, 322 U.S. 665, 671 . . .
>
> ''Although discrimination *vel non* is essentially a question of fact it is, at the same time, the *ultimate issue for resolution* in this case, *being expressly proscribed by 42 U.S.C.A. §2000e-2(a).* As such, a finding of discrimination or nondiscrimination is a finding of ultimate fact. *See, Hester* v. *Southern Railway Co.,* 5th Cir., 1974, 497 F.2d 1374, 1381; *United States* v. *Jackson Terminal Co.,* 5th Cir., 1971, 451 F.2d 418, 423-24.'' *Ibid.* (emphasis supplied)

Moreover,

> ''[A]s in *Humphrey* v. *Southwestern Portland Cement Co.,* 5th Cir., 1974, 488 F.2d 691, 694, *we must determine whether there are requisite subsidiary facts to undergird the ultimate facts.'' Ibid.* (emphasis supplied)

Thus, the Fifth Circuit binds itself to ''findings of subsidiary facts which are themselves not clearly erroneous'' (*Ibid.*), but makes an *independent* determination whether these subsidiary facts adequately support the ultimate fact. Its appellate analysis is essentially two-tiered.

Here by contrast, the Court of Appeals applies a one-stage ''clearly erroneous'' analysis, proceeding directly from the record to affirmance of the finding of discrimination. Although the court has said that ''the clearly erroneous standard does not shield findings that are unsupported'' (E4, n.2), this principle, as applied by the court here, means that the determination of whether the ultimate finding of discrimination was reached through an adequate analysis of relevant evidentiary findings is itself also limited by the ''clearly erroneous'' standard. Apparently, the First Circuit's practice is that, where the trial court states the proper legal standard, the appellate court will not make an independent analysis of how this standard was actually applied by the lower court. There is every indication that in evaluating the District Court's judgment in this case that the Court of Appeals in its recent review never departed from the ''clearly erroneous'' standard, despite the absence of critical findings of fact by the District Court. This is evident from the method of the Court's review and finally expressed in its statement that:

> ''Defendants have persuaded us that this was a close case, but not that the district court committed clear error in concluding that Sweeney was denied a promotion because of her sex.'' (E14)

Petitioners submit that this is not the proper standard of appellate review for Title VII discrimination cases. Given the meandering course that Title VII litigation has taken, parties and lower courts have both proceeded in the past on mistaken or misunderstood theories of what constituted relevant proof on critical issues. The question is often not simply one of whose burden of proof, but of

an opportunity for full consideration of the relevant facts. By restricting its scope of review to a simple "clearly erroneous" test of the ultimate finding, the First Circuit Court of Appeals has deferred to the trial court on matters of evidentiary competence and sufficiency more properly within its purview.

This practice is at odds with the policy of flexibility demonstrated by this Court in examining the critical question of intent in discrimination cases. In a separate, concurring opinion in *Washington* v. *Davis, supra,* Mr. Justice Stevens has stated the issue thus:

> "The extent of deference that one pays to the trial court's determination of the factual issue, and indeed, the extent to which one characterizes the intent issue as a question of fact or a question of law, will vary in differing contexts." 426 U.S., at 253.

Moreover, the Fifth and Seventh Circuits are not alone in making an independent determination of ultimate findings of fact. The Eighth Circuit, in a case under the Equal Pay Act (Fair Labor Standads Act of 1938, §6(d)(1), as amended, 29 U.S.C.A. §206(d)(1), stated that it would not be bound by the "clearly erroneous" rule in reviewing the trial court's finding that the work performed was not equal. *Schultz* v. *American Can Company—Dixie Products,* 424 F.2d 356, 360 & n.6 (8th Cir. 1970). *Accord,* Third Circuit in *Schultz* v. *Wheaton Glass Co.,* 421 F.2d 259, 267 (3rd Cir. 1970), *cert. denied,* 398 U.S. 905 (1970); and Fourth Circuit in *Hodgson* v. *Fairmount Supply Co.,* 454 F.2d 490, 493 (4th Cir. 1972). *Cf., Senter* v. *General Motors Corp.,* 532 F.2d 511, 526 (6th Cir.), *cert. denied* 429 U.S. 870 (1976), where the Sixth Circuit indicated in a Title VII class action that it was not bound by the "clearly erroneous" rule where the contention was that the district

court applied erroneous legal principles—cited also by the First Circuit here in n.2, at E3-E4.

Petitioners, however, did argue at length that erroneous legal principles were still, in effect, being applied here, and that a mere statement of the proper test by the District Court did not indicate that the proper test had been applied, nor foreclose on their right to have illuminating findings of subsidiary fact on the issues of motivation and pretext. (*See, e.g.,* n.3, at E4.) Thus, the question of whether proper legal principles had been properly applied in the instant case *was* before the Court of Appeals.

Moreover, Rule 52(a), relied on here by the Court of Appeals as the basis for its limited scope of review, is directed to "findings of fact". Nothing in the language of the rule itself indicates that it should also be applied to the *decision* of the trial court, simply because the decision under review may involve factual as well as legal considerations. Much in the history of the rule,[11] and in the weight of case law in diverse areas[12] indicates that the rule does not and should not bind the appellate court where the ultimate decision is a derivative inference based on primary inferences drawn from the record and from testimony, and where the derivative inference reflects certain assumptions or presumptions about the current state of the law. This Court has had occasion to examine the meaning of "discrimination", as used in Title VII, in a number of contexts. (*See, e.g.,* cases noted in *Furnco, supra,* 438 U.S., at 575-76 & n.7.) Nothing in these cases

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[11] *See,* 5A Moore's Federal Practice, ¶52.01 [6]-[8]; ¶52.02; ¶52.03[1], at 2613-17.

[12] *See,* 5A Moore's Federal Practice, ¶52.03[1], at 2624-26; ¶52.04, at 2682-86; ¶52.05[1], at 2693-97. Where a finding is a composite of fact and law, the clearly erroneous rule is not binding; where the factual finding is induced by an error of law or where, although the factual finding is sound, the composite conclusion is based on an error of law, the clearly erroneous rule is not binding. *Ibid.,* at 2696-97. Compare, patent litigation, ¶52.05[2].

suggests that an appellate court should defer on strict "clearly erroneous" principles to the trial court when a finding of discrimination under Title VII is involved. This is particularly so in the difficult academic setting where the employment decision is not within the employer's arbitrary control, but is delegated to a peer review committee; and the trial court's judgment may rest on inferences, rather than facts.

The Court of Appeals here should not have abdicated its appellate responsibility to make an independent assessment of the basis for the trial court's conclusion of discrimination in academic promotion. This Court should grant certiorari to bring consistency to principles of appellate review in employment discrimination cases.

II. This Court Should Grant Certiorari To Determine Whether the Terms of Its Remand Have Been Satisfied.

> "The issue now before us is *whether* the district court's *decision* in favor of Sweeney *is clearly erroneous.* [footnote omitted] Because of the procedural history of this case and the parties' disagreement over the issues before us, [footnote omitted] we have reviewed the record a second time in light of our current understanding of the law. We conclude that the district court's *decision was not clearly erroneous* and therefore affirm." (E3-E4, emphasis supplied)

This is how the Court of Appeals has stated the issue in its recent opinion. The procedural history to which the court refers is set forth in the "Statement of the Case", *supra.* The single most significant factor is this Court's remand last term. Petitioners submit that this remand for reconsideration placed on the Court of Appeals a greater

obligation than its ordinary appellate responsibility to review cases on appeal from district courts. The instant case was remanded because of an erroneous statement of defendants' burden of proof with a direction to apply the proper standard to defendants' evidence in reviewing the District Court's decision. (A1-A2, n.1) If the "clearly erroneous" test is a proper method for reviewing ultimate findings of discrimination generally, it surely is incongruous here in the context of this Court's remand for reconsideration in light of *Furnco, supra.*

Furthermore, as this Court noted specifically, the trial court's original opinion also contained the same erroneous language rejected by this Court in the remand.[13] The fact that the Court of Appeals declined to grant or deny petitioners' motion to make further argument in light of this remand, and instead deferred to the District Court for further proceedings and reconsideration, and that subsequently the District Court, without further proceedings summarily reaffirmed, should not have obscured the fundamental issue before the Court of Appeals on appeal.

This fundamental issue, the subject of this Court's remand, is *not* whether the original opinion of the District Court is clearly erroneous; but it is, rather, the very nature of the proof which constitutes the discriminatory intent, or motive, proscribed by Title VII. Under the holding of *Furnco, supra*, the touchstone case here, "the employer must be allowed some latitude to introduce evidence which bears on his motive". (438 U.S. at 580) This Court granted certiorari and remanded because it recognized that "petitioners clearly did produce evidence to support their . . . explanation", which the Court of Appeals had apparently disregarded (A2, n.2). Now, the Court of Appeals has

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[13] "The defendants . . . have not proven that they had a nondiscriminatory motive in failing to promote [plaintiff] in the academic year 1974-1975." (F25, Finding No. 8) See A2, n.2.

coupled the "clearly erroneous" rule with a theory of unconscious societal bias, originally articulated by the District Court, to nullify the evidentiary facts which this Court asked the appellate court to reconsider.

This Court should grant certiorari again because the fundamental issue of its remand, regarding proof of discriminatory motive under Title VII, has been evaded by the procedure below. Instead of reconsidering the issue of defendants' motive, the Court of Appeals has done nothing more than review the District Court's ultimate finding of sex discrimination under the "clearly erroneous" rubric of Rule 52(a). Since the District Court itself imposed "a heavier burden on the [defendants] than *Furnco* warrants" (A2; n.13, *supra*), the Court of Appeals has in reality given no independent consideration to the subject issue of the remand.

III. This Court Should Grant Certiorari Because the Court of Appeals, in Reconsidering the Issue of Discriminatory Motive, Has Reimposed a Heavier Burden on the Employer Than *Furnco* Warrants.

The Court of Appeals correctly stated in its first opinion, citing *Teamsters*,[14] *supra*, that:

> "[D]isparate treatment cases, such as this one, differ from disparate impact cases, such as *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). [Footnote ref., *Teamsters*, 431 U.S., at 335, n.15] We also recognize that *proof of discriminatory motive is critical in a disparate treatment case.*" 569 F.2d, at 174. (emphasis supplied)

[14] *Teamsters* was decided by this Court on May 31, 1977—*after* the original District Court decision in the instant case on April 13, 1977. The trial court did not then have the delineation of case types and proof requirements set forth by this Court in *Teamsters*.

Although the rule is easily stated, its application by the courts has been less than consistent and clear. The standard for proof of discriminatory motive under Title VII remains nebulous.

Particularly, if this case signals a judicial intention to subject academic employment decisions to new and stricter standards of scrutiny, then the circumstances under which the courts will intervene and set aside peer judgments should be more explicitly defined. *Compare, e.g., Powell* v. *Syracuse University*, 580 F.2d 1150 (2nd Cir. 1978), at 1153-54, and cases cited nn.8 & 9, 1157-58; and *Faro* v. *New York University*, 502 F.2d 1229 (2nd Cir. 1974).[15] College and university employers are entitled to know the standard

[15] *See also, Davis* v. *Weidner*, 596 F.2d 726 (7th Cir. 1979), where the court observes:

> "Several courts reviewing allegedly discriminatory university hiring practices or decisions have exhibited extraordinary deference to the judgment of university decisionmakers by expressly refusing to subject the reasons given for university employment decisions to more than the most minimal judicial scrutiny. . . . This judicial posture . . . can lead to the immunization of higher education from the requirements of Title VII. Congress did not intend such a result. . . . Congress must have recognized that . . . courts would be forced to examine critically university employment decisions." (*Id.*, at 731)

The Seventh Circuit found its way out of the "academic" dilemma in *Davis* by looking to the employer's prior treatment of the complainant employee, the employer's general policy towards minority employment, and the presence or absence of procedural safeguards in the employer's decisionmaking process. The court noted that while the plaintiff offered statistical evidence to demonstrate that the university's employment practices had a discriminatory impact on women employees, the small size of the relevant sample and the university's response to the evidence made the statistical showing unpersuasive. (*Id.*, at 732) Contrast with analysis by courts below in the instant case, where not only was the sample small, but the District Court ignored the fact that the number of women employed at Keene was not disproportionately small when evaluated by the relevant labor pools of separate academic departments. *See, e.g.*, E11-E12 & n.11; and n.17, *infra*.

of discriminatory motive against which peer employment decisions will be judged.

The Court of Appeals' recent opinion in this case embodies, or at the least, prefigures, a standard of intent which equates unconscious, unintentional societal bias with the discriminatory motive which must be proved in Title VII disparate treatment cases. Judicial application of such a standard creates the rebuttable presumption that decisions by men about women invariably constitute sex discrimination proscribed by the statute. The burden then falls inevitably under such a standard on defendants to prove by a preponderance of the evidence that even unconscious societal bias was not the motivating force in the decisionmaking process. (*N.B.* This is precisely the standard applied by the District Court when it said "the defendants . . . have not proven that they had a non-discriminatory motive in failing to promote [plaintiff]. . . ." (F25, Finding No. 8)) The problem is particularly acute, of course, where the defendants cannot point to some easy measurement by objective criteria to explain the employment decision. This Court may have squarely rejected the requirement that defendants prove absence of discriminatory motive (A1-A2), but the concept of unconscious societal bias which has been described and applied by the courts below nevertheless in reality imposes that burden on defendants.

The reasons given for plaintiff's nonpromotion in 1974-75 were primarily related to her *qualities* for advancement to full professor, rather than to her objective credentials for the rank, but the reasons given originated from the professional criteria set forth in the faculty manual.[16]

[16] The manual states that candidates for full professor "shall have a background of successful teaching and research, marked by the perspective of maturity and experience, or by some creative attribute generally recognizable in the academic world as a special asset to a faculty."

After receiving FAC's recommendation that the plaintiff be given more specific reasons, President Redfern conferred with Dean Davis and with FEAC, and then met with the plaintiff. (E5) Contemporaneous notes indicate the following reasons were explained to her:

> "Personalizes professional issues. People seem not to feel at ease in working with her. Rigid and narrow on perception of matters. Intolerant, for example, students' views, especially of differing attitudes. Maybe that now more active in specialty, your colleagues may perceive more strength. In supervision of student-teaching attention seems to be on details. Old-fashioned, for example, height of window shades. Report writing, graduate faculty minutes not professional caliber."

The Court of Appeals now criticizes the nature of these reasons, labeling them either "insubstantial or fictitious". (E11) The court has concluded:

> "[T]he district court could have concluded that the five male members of FEAC would not have fastened upon such reasons had Sweeney been a man." (E11)

The District Court's opinion, however, contains no reference to President Redfern's meeting with the plaintiff, nor of the explanation conveyed to her, which is now disparaged by the Court of Appeals. Except for the lower court's finding that Dean Davis' motivation was not sex bias (F13), its opinion contains no subsidiary findings about the motivation of those making the adverse decision. The District Court simply recounted conflicting testimony without comment; its opinion does not indicate what the trial court considered relevant to proof of pretext—other than

the "disproportionately small number of women in high ranks". (F23, F25, Finding No. 9)[17]

The Court of Appeals now says:

> "The defendants' alleged reasons border on describing Sweeney as, to quote plaintiff's brief, a 'schoolmarm'." (E10)

This characterization is the Court of Appeals' own conclusion; it does not appear in the trial court's opinion, nor in any of defendants' explanations. The Court of Appeals itself has reduced the reasons given to "personality" and to a female stereotype suggested by the plaintiff. The appellate court appears to reject the subjective and qualitative reasons *per se,* at least when applied by

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[17] The Court of Appeals' first opinion in this case, 569 F.2d 169, at 175, has been cited at least once for the proposition that "*statistics alone* can fulfill burden of proof in *individual disparate-treatment case*". *Bilingual Bicultural Coalition, Etc.* v. *F.C.C.*, 595 F.2d 621 (D.C. Cir. 1978), at 643, n.59; (emphasis supplied). Yet, the methodology of statistical inference outlined in the *Bilingual* case, and employed by this Court in *Castaneda* v. *Partida*, 430 U.S. 482, 496-97, n.17 (1977) and *Hazelwood School Dist.* v. *United States*, 433 U.S. 229, 308-13, nn. 13, 14 (1977), involves a statistical analysis of the disparity between the expected value and the observed number. In such a framework, the question becomes what level of statistically-indicated disparity will trigger a finding of intentional discrimination. This Court in *Hazelwood, supra,* indicated that

> "[a]s a general rule for such large samples, if the difference . . . is greater than two or three standard deviations, then the hypothesis that teachers were hired without regard to race would be suspect." (*Ibid.*, at n.14).

Such statistical analysis was notably lacking in the instant case, as the Court of Appeals now concedes. (E11 & n.11) There is no basis for the District Court's conclusion that the numbers were "disproportionately" small in the absence of any relevant figures for comparison. The District Court did note testimony that the student body was sixty percent female, and that there should be more female professors to serve as role models (F15-F16), but this comparison was rejected as irrelevant in *Hazelwood, supra.*

men to a woman. (E11) This analysis of pretext, however, is deficient:

(1) The conclusion that "personality" reasons were applied only to women is not supported by the record;[18]
(2) The personal dimension cannot be isolated from the professional qualifications, particularly where the stated criteria for promotion include teaching and research "marked by the perspective of maturity and experience, or some creative attribute generally recognizable . . ." (E5);
(3) The courts have not heretofore held that decisions which involve personal or subjective elements are *per se* illegitimate—*Davis, supra,* 596 F.2d, at 731; *Powell, supra,* 580 F.2d, at 1158;
(4) Narrow-mindedness is not an exclusively feminine trait, nor strictly a matter of personality; it is a legitimate aspect of professional maturity;
(5) Objective examples of plaintiff's relatively weak qualifications were offered—e.g., she had not published since coming to Keene (F10), and her writing contained errors in grammar and diction (E5); and
(6) The District Court never addressed itself to the motivation of FEAC, despite requests to do so;

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[18] Insofar as the attributes identified as the reasons for plaintiff's nonpromotion (E5-E7) are related to personality, such attributes were also described in reference to male candidates. One unsuccessful male candidate for full professor was reproved by his department chairman for his meek and unassertive manner. Another male who was unsuccessful in his first attempts to be promoted to full professor was considered difficult to work with, unpopular with some of his colleagues, and authoritarian. On the other hand, one male candidate was described in positive terms as having great sensitivity to both people and ideas.

there were no subsidiary findings of fact about the reasons given which the Court of Appeals could review under the "clearly erroneous" test. *See,* discussion of "clearly erroneous" test, *supra,* at 14-20.

Moreover, the record does contain evidence that plaintiff was narrow-minded in some of her attitudes. Such evidence was introduced bearing directly on the motivation of Dr. Quirk, the FEAC chairman in the critical year, 1974-75. Quirk said he had served with the plaintiff on the Admissions and Standards Committee in 1974-75 and that he had disagreed with her over reviewing students' applications to the Department of Education.

> "Quirk felt that Sweeney's advocacy of a 'subjective interview' as a requirement for admission, allegedly without any criteria, and her statement, in response to his question, that convicts had 'no place in front of the classroom' were examples of her 'lack of maturity'." (E6)

However, the District Court makes no mention of this, and the Court of Appeals appears to discount it totally. (E6) The Court of Appeals uses the hypothesis of unconscious societal bias to uphold the lower court's decision:

> "One familiar aspect of sex discrimination is the practice, *whether conscious or unconscious,* of subjecting women to higher standards of evaluation . . .". (E13-E14, emphasis supplied)

This hypothesis, unsupported by any showing of systematic exclusion,[19] represents a new definition of purpose-

[19] Within the rule of *Hazelwood* and *Castenada, supra,* n.17, in addition to there being no statistically-indicated disparity between the number of males and females in the various ranks, the record contains other evidence that women were not systematically excluded. For example,

> "President Redfern testified that the college is now promoting women at the instruction level [sic] at a higher rate than men, but after that, the promotion rate favors men. This differential was explained on the grounds that, until recently, the faculty had a ratio of four or five males to one female. . . . [F]our out of twelve department heads are women. . . . There are two female full professors, Dr. Grayson and the plaintiff. The college has the only woman athletic director of a coeducational college. . .". (F14)

ful discrimination in disparate treatment cases under Title VII, which finds no support in this Court's past decisions. Although the standard of intent applicable under Title VII in disparate treatment cases has not found entirely unanimous expression by this Court, nothing previously stated indicates that unconscious societal bias rises to a statutory violation.

McDonnell Douglas Corp. v. *Green, supra,* a unanimous opinion setting forth the disparate treatment theory in an individual case, contains the following language about proof of motive:

> "[R]espondent must be given a full and fair opportunity to demonstrate by *competent* evidence that the *presumptively valid reasons* for his rejection were in fact a *cover-up for* a racially *discriminatory decision.*" 411 U.S., at 805 (emphasis supplied)

The issue of conscious, intentional discrimination versus unconscious, cultural bias never arose.

In *Washington* v. *Davis, supra,* the Court directly addressed the question of intent in a case raised on constitutional issues. In a majority opinion, the Court rejected application of a disparate impact standard in a constitutional case, saying,

"[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact." 426 U.S. at 239.

In a concurring, but separate opinion, Mr. Justice Stevens, wrote:

"Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. . . .

"My point in making this observation is to suggest that the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court's opinion might assume. I agree, of course, that *a constitutional issue does not arise every time some disparate impact is shown.*" *Id.*, at 253-54 (emphasis supplied)

While *Washington* v. *Davis, supra,* ostensibly re-established the requirement of intent in constitutional cases, the concept of intent under Title VII awaited further definition. This Court's decision in *General Electric Co.* v. *Gilbert, supra,* seems to indicate that discrimination under Section 703(a)(1) of Title VII [42 U.S.C. §2000e-2(a)(1)] is the same as the concept of discrimination associated with the Fourteenth Amendment for nearly a century.

"When Congress makes it unlawful for an employer to 'discriminate . . . because of . . . sex . . . ,' without further explanation of its meaning, we should not readily infer that it meant something different from what the concept of discrimination has traditionally meant . . .". 429 U.S., at 145.

These statements drew exceptions from other members of this Court. Mr. Justice Brennan and Mr. Justice Marshall found the majority's implication that the Fourteenth Amendment standard of discrimination was coterminous with that applicable to Title VII wholly unacceptable. (*Id.*, at 153, n.6) Mr. Justice Stevens, in his dissenting opinion, stated:

"[T]he plaintiffs' burden of proving a prima facie violation of [the equal protection clause] is significantly heavier than the burden of proving a prima facie violation of a statutory prohibition against discrimination". *Id.*, at 160-61.

Similarly, the Court of Appeals in the instant case said in its first opinion:

"We do not read *General Electric Co.* v. *Gilbert* . . . as altering *McDonnell Douglas.* In *Gilbert* the court found that the plaintiff had not shown a disproportionate impact on women. . . . The issue of disparate treatment was not involved." 569 F.2d at 177, n.15.

Subsequent decisions by this Court have not completely clarified whether the statutory standard of intent is the same as the constitutional standard, in those statutory cases where proof of motive is critical. In *Teamsters, supra,* the majority said:

"Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. *See, e.g., Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 265-266 [1977]. . . .

"Claims of disparate treatment may be distinguished from claims that stress 'disparate impact'. . . . Proof of discriminatory motive, we have held, is not required under a disparate impact theory." 431 U.S., at 335, n.15.

The citation of *Village of Arlington Heights* in *Teamsters, supra,* ties the standard again to a *constitutional* case. *Arlington* discusses proof of discriminatory purpose, as follows:

"Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available. The impact of the official action—whether it 'bears more heavily on one race than another', *Washington* v. *Davis, supra,* at 242,. . . —may provide an important starting point. Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face. *Yick Wo* v. *Hopkins,* 118 U.S. 356 . . . (1886); . . . *Gomillion* v. *Lightfoot,* 364 U.S. 339. . . . The evidentiary inquiry is then relatively easy [footnote omitted] but such cases are rare. *Absent a pattern as stark as that in Gomillion* or *Yick Wo, impact alone is not determinative,* [footnote omitted] and the Court must look to other evidence. [footnote omitted]" 429 U.S., at 266. (emphasis supplied)

More recently, in *Furnco, supra,* this Court explained discriminatory motive in common sense terms:

"A *McDonnell Douglas* prima facie showing is not the equivalent of a factual finding of discrimination, however. Rather, it is simply proof of actions taken by the employer from which we infer discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not those actions were bottomed on impermissible considerations. When the prima facie showing is understood in this manner, the employer must be allowed some latitude to introduce evidence which bears on his motive." 438 U.S., at 579-80.

Petitioners do not submit that societal bias is never relevant to the issue of discriminatory motive required in Title VII disparate treatment cases. Petitioners submit, however, that this unconscious societal bias is too amorphous, and too subject to abuse in application, to be a meaningful *standard* of intent. The courts have recognized that the academic employment setting is a particularly difficult one in which to detect discriminatory motive. But, if Congress did not intend that higher education be immunized from the requirements of Title VII, neither did Congress intend that academic employment decisions be tested by the rarified standard of unconscious, unintentional motivation. Petitioners submit that the courts must focus foremost on observable actions of the decisionmakers themselves and avoid the pitfalls of speculation about the subconscious. At the very least, there must be evidence linking the generalized inference of bias to the specific decisionmakers in an individual case.

This Court should grant certiorari to clarify the standard of intent against which peer decisions will be judged. Just

as "a constitutional issue does not arise every time some disparate impact is shown"[20]—neither does disparate treatment under Title VII occur with every intimation of societal bias. Furthermore, this Court should grant certiorari to reject the presumption, inherent in the societal bias standard of intent, that decisions by men about women constitute unlawful sex discrimination requiring rebuttal.

Conclusion

On one level, the issues presented here question simply the substantive and procedural handling by the courts below of evidence relating to proof of motive and pretext; but on another level, the issues here speak to the reach of the courts' power to set aside the decisions of elected peer representatives on the basis of such attentuated inference. For all the foregoing reasons, petitioners ask this Court to grant certiorari again and to examine the issues presented here.

Respectfully submitted,

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[20] *Washington* v. *Davis*, *supra*, 426 U.S., at 254, concurring opinion of Mr. Justice Stevens.

APPENDIX A

In the Supreme Court of the United States

BOARD OF TRUSTEES OF KEENE STATE COLLEGE ET AL *v.* CHRISTINE M. SWEENEY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 77-1792. Decided November 13, 1978

PER CURIAM.

The petition for a writ of certiorari is granted. In *Furnco Construction Co.* v. *Waters*, 438 U.S. — (June 29, 1978), we stated that "[t]o dispel the adverse inference from a prima facie showing under *McDonnell Douglas*, the employer need only 'articulate some legitimate, nondiscriminatory reason for the employee's rejection.' " *Id.* at — (slip op., at 10), quoting *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973). We stated in *McDonnell Douglas*, *supra*, that the plaintiff "must . . . be afforded a fair opportunity to show that [the employer's] stated reason for [the plaintiff's] rejection was in fact pretext." 411 U.S. at 804. The Court of Appeals in the present case, however, referring to *McDonnell Douglas*, *supra*, stated that "in requiring the defendant to *prove absence of discriminatory motive*, the Supreme Court placed the burden squarely on the party with the greater access to such evidence." *Sweeney* v. *Board of Trustees of Keene State College*, 569 F. 2d 169, 177 (CA1 1978) (emphasis added).[1]

[1] While the Court of Appeals did make the statement that the dissent quotes, *post*, at 2, it also made the statement quoted in the

While such words as "articulate," "show," and "prove," may have more or less similar meanings depending upon the context in which they are used, we think that there is a significant distinction between merely "articulat[ing] some legitimate, nondiscriminatory reason" and "prov[ing] absence of discriminatory motive. By reaffirming and emphasizing the *McDonnell Douglas* analysis in *Furnco Construction Co.* v. *Waters, supra*, we made it clear that the former will suffice to meet the employer's prima facie case of discrimination. Because the Court of Appeals appears to have imposed a heavier burden on the employer than *Furnco* warrants, its judgment is vacated and the case is remanded for reconsideration in the light of *Furnco, supra,* at — (slip. op., at 10).[2]

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text above. These statements simply contradict one another. The statement quoted in the text above would make entirely superfluous the third step in the *Furnco—McDonnell Douglas* analysis, since it would place on the employer at the second stage the burden of showing that the reason for rejection was not a pretext, rather than requiring such proof from the employee as a part of the third step. We think our remand is warranted both because we are unable to determine which of the two conflicting standards the Court of Appeals applied in reviewing the decision of the District Court in this case, and because of the implication in its opinion that there is no difference between the two standards. We of course intimate no view as to the correct result if the proper test is applied in this case.

[2] We quite agree with the dissent that under *Furnco* and *McDonnell Douglas* the employer's burden is satisfied if he simply "explains what he has done" or "produc[es] evidence of legitimate nondiscriminatory reasons." *Post,* at 4. But petitioners clearly did produce evidence to support their legitimate nondiscriminatory explanation for refusing to promote respondent during the years in question. See 569 F. 2d 172-173, 178; Pet. for Cert. B-2 to B-24. Nonetheless, the Court of Appeals heid that petitioners had not met their burden because the proffered legitimate explanation did not "rebut" or "disprove" respondent's prima facie case or "prove absence of nondiscriminatory motive." 569 F. 2d, at 177-179; see Pet. for Cert. B-25. This holding by the Court of Appeals is further support for our belief that the court appears to have imposed a heavier burden on the employer than *Furnco,* and the dissent here, requires.

In the Supreme Court of the United States

BOARD OF TRUSTEES OF KEENE STATE COLLEGE ET AL *v.* CHRISTINE M. SWEENEY

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 77-1792. Decided November 13, 1978

MR. JUSTICE STEVENS, with whom MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, and MR. JUSTICE MARSHALL join, dissenting.

Whenever this Court grants certiorari and vacates a Court of Appeals judgment in order to allow that court to reconsider its decision in the light of an intervening decision of this Court, the Court is acting on the merits. Such action always imposes an additional burden on Circuit Judges who—more than any other segment of the Federal Judiciary—are struggling desperately to keep afloat in the flood of federal litigation. For that reason, such action should not be taken unless the intervening decision has shed new light on the law which, if it had been available at the time of the Court of Appeals' decision, might have led to a different result.

In this case, the Court's action implies that the recent opinion in *Furnco Construction Corp.* v. *Waters*, 438 U.S. —, (June 29, 1978), made some change in the law as explained in *McDonnell Douglas Corp.* v. *Greene,* 411 U.S. 792. When I joined the *Furnco* opinion, I detected no such change and I am still unable to discern one. In both cases, the Court clearly stated that when the complainant in a Title VII trial establishes a prima facie case of discrimi-

nation, "the burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race."[1]

The Court of Appeals' statement of the parties' respective burdens in this case is wholly faithful to this Court's teachings in *McDonnell Douglas*. The Court of Appeals here stated:

> "As we understand those cases [*McDonnell Douglas* and *International Brotherhood of Teamsters*, 431 U.S. 324], a plaintiff bears the initial burden of presenting evidence sufficient to establish a prima facie case of discrimination. *The burden then shifts to the defendant to rebut the prima facie case by showing that a legitimate, nondiscriminatory reason accounted for its actions.* If the rebuttal is successful, the plaintiff must show that the stated reason was a mere pretext for discrimination. *The ultimate burden of persuasion on the issue of discrimination remains with the plaintiff who must convince the court by a preponderance of the evidence that he or she has been the victim of discrimination.*" *Sweeney* v. *Board of Trustees of Keene State College*, 569 F.2d 169, 177 (CA1, 1978) (emphasis added).

This statement by the Court of Appeals virtually parrots this Court's statements in *McDonnell Douglas* and *Furnco*. Nonetheless, this Court vacates the judgment on the ground that "the Court of Appeals appears to have imposed a heavier burden on the employer than *Furnco* warrants." *Post*, at 2. As its sole basis for this conclusion, this Court relies on a distinction drawn for the first time in this case "between merely 'articulat[ing] some legitimate, nondiscriminatory reason' and 'prov[ing] absence of discriminatory motive.' " *Post*, at 2.[2] This novel distinction has two parts, both of which are illusory and unequivocally rejected in *Furnco* itself.

First is a purported difference between "articulating"

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[1] This language is quoted from the following paragraph in *Furnco*:

> "When the prima facie case is understood in the light of the opinion in *McDonnell Douglas*, it is apparent that the burden which shifts to the employer is merely that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race. To prove that, he need not prove that he pursued the course which would both enable him to achieve his own business goal *and* allow him to consider the *most* employment applications. Title VII forbids him from having as a goal a work force selected by any proscribed discriminatory practice, but it does not impose a duty to adopt a hiring procedure that maximizes hiring of minority employees. To dispel the adverse inference from a prima facie showing under *McDonnell Douglas*, the employer need only 'articulate some legitimate nondiscriminatory reason for the employee's rejection.' " 438 U.S. at ___ (emphasis in original).

The comparable passage in *McDonnell Douglas* reads as follows:

> "The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection. We need not attempt in the instant case to detail every matter which fairly could be recognized as a reasonable basis for a refusal to hire. Here petitioner has assigned respondent's participation in unlawful conduct against it as the cause for his rejection. We think that this suffices to discharge petitioner's burden of proof at this stage and to meet respondent's prima facie case of discrimination." 411 U.S. at 802-803.

[2] The Court also suggests that "further support" for its decision is derived from the Court of Appeals' "holding" that "respondent had not met its burden because the proffered legitimate explanation did not 'rebut' or 'disprove' petitioner's prima facie case . . . 569 F. 2d, at 177-179." *Post*, at 2 n. 2. The actual "holding" of the Court of Appeals was that "the trial court's finding that sex discrimination impeded the plaintiff's second promotion was not clearly erroneous." 569 F. 2d, at 179. The Court of Appeals reached this conclusion by considering all of the evidence presented by both parties to determine whether the evidence of discrimination offered by the plaintiff was "sufficient to sustain the district court's finding" in light of the counter evidence offered by the employer. *Ibid.* Such factual determinations by two federal courts are entitled to a strong presumption of validity.

and "proving" a legitimate motivation. Second is the difference between affirming a nondiscriminatory motive and negating a discriminatory motive.

With respect to the first point, it must be noted that it was this Court in *Furnco,* not the Court of Appeals in this case, that stated that the employer's burden was to "*prov*[*e*] that he based his employment decision on a legitimate consideration."[3] Indeed, in the paragraph of this Court's opinion in *Furnco* cited earlier, the words "prove" and "articulate" were used interchangeably,[4] and properly so. For they were descriptive of the defendant's burden in a trial context. In litigation the only way a defendant can "articulate" the reason for his action is by adducing evidence that explains what he has done; when an executive takes the witness stand to "articulate" his reason, the litigant for whom he speaks is thereby proving those reasons. If the Court intends to authorize a method of articulating a factual defense without proof, surely the Court should explain what it is.

The second part of the Court's imaginative distinction is also rejected by *Furnco.* When an employer shows that a legitimate nondiscriminatory reason accounts for his action, he is simultaneously demonstrating that the action was not motivated by an illegitimate factor such as race. *Furnco* explicitly recognized this equivalence when it defined the burden on the employer as "that of proving that he based his employment decision on a legitimate consideration, and not an illegitimate one such as race."[5] Whether the issue is phrased in the affirmative or in the negative,

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[3] 438 U.S., at ___ (emphasis added). Quoted in n. 1, *supra.* It should also be noted that the Court of Appeals did not state that the petitioner's burden here was to "prove" anything; rather, the burden which shifted to the defendants was to "show" a legitimate reason for its action.

[4] See n. 1, *supra.*

[5] 438 U.S., at ___.

the ultimate question involves an identification of the real reason for the employment decision. On that question—as all of these cases make perfectly clear—it is only the burden of producing evidence of legitimate nondiscriminatory reasons which shifts to the employer; the burden of persuasion, as the Court of Appeals properly recognized, remains with the plaintiff.

In short, there is no legitimate basis for concluding that the Court of Appeals erred in this case—either with or without the benefit of *Furnco.* The Court's action today therefore needlessly imposes additional work on Circuit Judges who have already considered and correctly applied the rule the Court directs them to reconsider and reapply.

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 77-1243.

CHRISTINE M. SWEENEY,
PLAINTIFF, APPELLEE,
v.
BOARD OF TRUSTEES OF KEENE STATE COLLEGE, ET AL.,
DEFENDANTS, APPELLANTS.

No. 77-1244.

CHRISTINE M. SWEENEY,
PLAINTIFF, APPELLANT,
v.
BOARD OF TRUSTEES OF KEENE STATE COLLEGE, ET AL.,
DEFENDANTS, APPELLEES.

Before COFFIN, *Chief Judge,*
TUTTLE,* *Circuit Judge*
and CAMPBELL, *Circuit Judge.*

ORDER OF COURT

Entered: December 19, 1978

Upon consideration of motion for leave to file additional briefs and make further argument to this Court, objection thereto, and response to objection,

It is ordered that this cause is hereby remanded to the District Court (attention of Judge Bownes, sitting by designation) for further proceedings and reconsideration in the light of *Furnco Construction Co.* v. *Waters,* 438 U.S. — (1978).

By the Court:
DANA H. GALLUP, *Clerk.*

[cc: Messrs. Millimet and Middleton]

* Of the Fifth Circuit, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

Civil Action No. 75-182

CHRISTINE M. SWEENEY

v.

BOARD OF TRUSTEES OF KEENE STATE COLLEGE, ET AL.

ORDER

Pursuant to the order of the First Circuit Court of Appeals of December 19, 1978, I have reconsidered and reexamined my opinion in the light of *Furnco Construction Co.* v. *Waters,* 438 U.S. ___, 46 U.S.L.W. 4966 (June 29, 1978). I have also, of course, reread *Sweeney* v. *Board of Trustees of Keene State College,* 569 F.2d 169 (1978), and studied carefully the decision of the Supreme Court granting certiorari, 47 U.S.L.W. 3330 (Nov. 13, 1978).

While my original opinion was perhaps not as detailed as to the *McDonnell Douglas* test as it could have been, I did not, of course, have the benefit of *Furnco* at the time it was written. While the reasoning of *Furnco* cannot be applied retroactively, I can make clear the reasoning I used in *Sweeney.*

The plaintiff, Christine M. Sweeney, established a prima face case under the *McDonnell Douglas* standard: she was a member of the protected class, she had the qualifications to be promoted to full professor during the academic year 1974-75, and males with no greater qualifications had been promoted to full professors. Defendants did adduce evidence of legitimate nondiscriminatory reasons for not promoting plaintiff. Plaintiff then proved to my satisfaction that the basic reason for the failure to promote her was because of her sex, that the reasons advanced by the de-

fendants were pretextual, and that plaintiff would have been promoted in the academic year 1974-75 but for the fact that she was a woman.

My opinion and findings are in all respects reaffirmed.

So Ordered.

(s) Hugh H. Bownes
United States Circuit Judge
Sitting by Designation

January 29, 1979

cc. Jack B. Middleton, Esq.
Joseph A. Millimet, Esq.

APPENDIX D

United States District Court for the
District of New Hampshire

Civil Action No. 75-182

Christine M. Sweeney

v.

Board of Trustees of Keene State College, et al.

ORDER

Defendants' request for hearing and motion for amendment of "Request For Relief" are both denied.

The First Circuit Court of Appeals, with notice to both parties, on December 19, 1978, remanded this case to me sitting by designation.

I took no action on this case between the time it was remanded and the date of my order of January 29, 1979.

During the long interval between the time the case was remanded to me and January 29, neither party requested a hearing nor was any motion filed. It appears to me that a six week period of time is ample for counsel to decide whether or not to file motions and/or requests.

Defendants' request for a hearing and its motion to amend its request for relief are too late.

It is my opinion that I have complied fully with the remand order of the First Circuit Court of Appeals and that there is nothing further pending before me in this case.

So Ordered.

(s) Hugh H. Bownes
United States Circuit Judge
Sitting by Designation

February 20, 1979

cc. Jack B. Middleton, Esq.
Joseph A. Millimet, Esq.

APPENDIX E

United States Court of Appeals
For the First Circuit

No. 79-1112

CHRISTINE M. SWEENEY,

PLAINTIFF, APPELLEE,

v.

BOARD OF TRUSTEES OF
KEENE STATE COLLEGE, ET AL.,

DEFENDANTS, APPELLANTS.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE
[HON. HUGH H. BOWNES,* *U.S. Circuit Judge*]

Before COFFIN, *Chief Judge*,
CAMPBELL, *Circuit Judge*,
and SKINNER,** *District Judge*.

Joseph A. Millimet, with whom *Devine, Millimet, Stahl & Branch, Professional Association*, was on brief, for appellants.

Jack B. Middleton, with whom *Robert A. Wells*, and *McLane, Graf, Greene, Raulerson & Middleton, Professional Association*, were on brief, for appellee.

August 21, 1979

CAMPBELL, *Circuit Judge*. This case is before us for the second time. Our affirmance of the district court's decision that Sweeney's promotion to Professor of Education at Keene State College was delayed because of her sex, *Sweeney* v. *Board of Trustees of Keene State College*, 569 F.2d 169 (1978), was vacated and remanded by the Supreme Court "for reconsideration in the light of Furnco [Construction Corp. v. Waters, 438 U.S. 567 (1978)]." 47 U.S.L.W. 3330, 3331 (Nov. 13, 1978). We in turn remanded to the district court, which

* Of the First Circuit, sitting by designation.

** Of the District of Massachusetts, sitting by designation.

again found in Sweeney's favor. No. 75-182 (D.N.H. Jan. 29, 1979). Keene State College once again appeals.

From the beginning, Sweeney has sought to prove her claim of sex discrimination by the methodology in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). Under that case, an individual Title VII plaintiff may proceed by first establishing a "prima facie case" of discrimination; this then requires the defendant to "articulate" a legitimate, non-discriminatory reason for its adverse action regarding the plaintiff. To prevail, the plaintiff ultimately must prove that the reason given is a pretext for discrimination. *See* 411 U.S. at 802-05. Since the Supreme Court vacated our first *Sweeney* decision, we have taken pains to point out that, under *McDonnell Douglas*, the defendant's burden is merely a burden of production, and that the burden of persuasion remains at all times with the plaintiff. *Loeb* v. *Textron*, No. 78-1340, slip op. at 10-12 (June 21, 1979).

The error that prompted the Supreme Court to vacate our original decision occurred in our discussion of defendants' obligation to "articulate" a legitimate reason for Sweeney's non-promotion once plaintiff had established a prima facie case. We stated erroneously that defendants were required "to prove absence of discriminatory motive." 569 F.2d at 177. In remanding the case to us, the Supreme Court reemphasized the actual language and rule of *McDonnell Douglas*, 411 U.S. at 802, and *Furnco*, 438 U.S. at 578, that a Title VII defendant need only "articulate" a valid reason, and indicated that defendants surely had done so. *See* 47 U.S.L.W. at 1330-31 & n. 2. The Court was concerned that we had "imposed a heavier burden on the employer than *Furnco* warrants." 47 U.S.L.W. at 1331.

On further remand from us, the district court manifested its understanding that defendants had met their limited burden of articulating facially valid reasons for not promoting Sweeney, and concentrated upon the ultimate question: whether Sweeney had proven by a preponderance that the reasons

stated were pretexts for discrimination. The court concluded that Sweeney had met her burden in this regard:

> "[Sweeney] proved to my satisfaction that the basic reason for the failure to promote her was because of her sex, that the reasons advanced by the defendants were pretextual, and that plaintiff would have been promoted in the academic year 1974-75 but for the fact that she was a woman."

See Fisher v. *Flynn*, 598 F.2d 663, 665 (1st Cir. 1979) (Title VII plaintiff must meet "but for" standard of proof); *cf. Loeb*, slip op. at 25-26 (same rule in ADEA cases).[1]

The issue now before us is whether the district court's decision in favor of Sweeney is clearly erroneous.[2] Because of the

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[1] Although the district court acted before our decision in *Loeb* v. *Textron*, No. 78-1340 (June 21, 1979), was released, nothing in its opinion suggests that it applied a legal standard inconsistent with *Loeb* or, more importantly, with *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567 (1978).

[2] We indicated that we followed the clearly erroneous standard of Fed. R. Civ. P. 52(a) in our first *Sweeney* decision, *Sweeney* v. *Board of Trustees of Keene State College*, 569 F.2d 169 (1978). Defendants now urge us to abandon that standard in Title VII cases on the ground that a "factual" finding that a plaintiff was denied a promotion because of her sex is equivalent to a finding on the ultimate legal issue of discrimination. This argument has persuaded some circuits that appellate courts should make an independent determination of the question of discrimination and apply the clearly erroneous standard only to the district court's findings of subsidiary facts. *E.g.*, *Stewart* v. *General Motors Corp.*, 542 F.2d 445, 449 (7th Cir. 1976), *cert. denied*, 433 U.S. 919 (1977); *Causey* v. *Ford Motor Co.*, 516 F.2d 416, 420-21 (5th Cir. 1975). We are not inclined to that approach. This circuit has applied the clearly erroneous standard to conclusions involving mixed questions of law and fact except where there is some indication that the court misconceived the legal standards. *E.g.*, *Burgess* v. *M/V Tamano*, 564 F.2d 964, 976-77 (1st Cir. 1977), *cert. denied*, 435 U.S. 941 (1978) (admiralty negligence); *Raymond* v. *Eli Lilly & Co.*, 556 F.2d 628, 629-30 (1st Cir. 1977) (finding of reasonable diligence) (per curiam); *Forbro Design Corp.* v. *Raytheon Co.*, 532 F.2d 758, 763 (1st Cir. 1976) (finding of "obviousness"); *cf. Senter* v. *General Motors Corp.*, 532 F.2d 511, 526 (6th Cir.), *cert. denied*, 429 U.S. 870 (1976)

procedural history of this case and the parties' disagreement over the issues before us,[3] we have reviewed the record a second time in light of our current understanding of the law. We conclude that the district court's decision was not clearly erroneous and therefore affirm.

Sweeney inititated the promotion procedure in the fall of 1974; in November Dr. St. John, then Chair of the Education Department, wrote to Dean Davis that Sweeney wished to be considered for full professor and had the support of the department's Advisory Committee on Promotions, although he personally had mixed feelings about her case.[4] In any event, she was considered by the 1974-75 Faculty Evaluations Advisory

(court not bound by "clearly erroneous" principle where party contends wrong legal principle applied). We see no reason to depart from this course in discrimination cases; the opportunity for first-hand observation may be especially important in one such as this, where the issue is whether "personality" reasons were sexually biased. We shall look carefully, however, to detect infection from legal error, and of course the clearly erroneous standard does not shield findings that are unsupported or arbitrary. *See generally United States* v. *United States Gypsum Co.*, 333 U.S. 364, 394-95 (1948); 9 C. Wright & A. Miller, *Federal Practice & Procedure* §§ 2589-2591 (1971).

[3] Defendants ask us to reconsider the entire case and phrase the issue before us expansively. They ask what evidence is necessary to sustain a finding of discrimination when employment decisions are made through a system of peer group review, and to what extent evidence used to establish a prima facie case or general inference of discrimination can be relied upon to conclude that a defendant's action as to an individual plaintiff was discriminatory. Sweeney would have us construe the Supreme Court's remand order as no more than a request for clarification of the standard used in our first decision, and not for complete reconsideration of the case. She argues that the opinions below demonstrate that the district court and this court in its original opinion applied the proper legal standards, despite our misstatement as to the defendants' burden, and that we therefore need not review the evidence again. Alternatively, she argues that the evidence demonstrates "unequivocally" that the reasons for non-promotion were pretexts.

[4] *See* note 12, *infra*.

Committee (FEAC), which recommended against her promotion.[5] Dean Davis then wrote to Sweeney that she would not be promoted and gave her the "pro forma" explanation that she had,

> "not fulfilled the qualifications as stated in the Faculty Manual; namely, that your teaching and research has not been 'marked by the perspective of maturity and experience, or by some creative attribute generally recognizable in the academic world as a special asset to a faculty.' "

In November 1975, however, after the Faculty Appeals Committee (FAC) had urged that Sweeney be given more specific reasons for the adverse decision, *see* 569 F.2d at 173, President Redfern conferred with Dean Davis and with former FEAC members and then met with Sweeney. The evidence shows that he told Sweeney that the reasons were largely personal ones: that the FEAC members thought that she "personalized professional matters," was rigid, narrow-minded, and inflexible, intolerant of students' views and "old fashioned" in her supervision of student teaching. Her alleged concern with the height of window shades was cited as an example. Redfern also said that her minutes of the graduate faculty meetings were thought not to be of professional caliber, and that she did not show a "give and take" spirit on committees. These reasons were brought out at trial, where they were supplemented by the testimony of Dr. Quirk, who was Chairman of the 1974-75 FEAC.

Dr. Quirk testified that Sweeney's case for promotion was "weak" and "mediocre...at best." The 1974-75 FEAC, which

[5] Keene State follows a promotion procedure under which candidates apply through their departments to the Faculty Evaluations Advisory Committee (FEAC). The departmental chairman forwards the application to FEAC, which makes a recommendation to the Dean. The Dean usually adopts FEAC's recommendation and, if it is positive, forwards it to the Trustees for final approval. *See* 569 F.2d at 172-73.

consisted of five men, considered five candidates for promotion to full professorships—three men and two women. Only two were recommended: one man, James Smart (vote 3-2), and one woman, Janet Grayson (vote 5-0). The vote against Sweeney was five to zero. According to Quirk, the reasons for the vote were "varied."

> "There were quite a few reasons. But it was probably just an extremely weak case. I think one has to look at the criteria involved in promotion, and when [sic] one has to keep in mind the fact that that is promotion to the top rank of the college, that is, to full professor, and when you view it that way, the case has to be a positive, a strong positive case for recommendation for promotion to this top rank. If you look at the categories involved, there are basically three categories in which we make a judgment. One of the categories is teaching effectiveness. The other is contribution to the college. And the third is scholarly qualifications."

Defense counsel on direct examination brought out that Sweeney had served on no campus-wide committees except the College Senate, to which she was elected by her department rather than on a campus-wide basis. Quirk also testified that he had served with Sweeney on the Admissions and Standards Committee in 1974-75 and that their relationship had been marked by "some disagreements" over reviewing students' applications to the Education Department for professional education. Quirk felt that Sweeney's advocacy of a "subjective interview" as a requirement for admission, allegedly without any criteria, and her statement, in response to his question, that convicts had "no place in front of the classroom" were examples of her "lack of maturity."[6]

[6] On cross-examination it was brought out that Quirk had had other differences with Sweeney because he had signed course registration cards for his wife, an education student who officially was Sweeney's advisee.

The reasons given for the 1974-75 denial of Sweeney's promotion thus were, in essence, that Sweeney had a tendency to be narrow-minded and rigid, to personalize professional matters, and to be difficult to work with. Defendants did not state that Sweeney was lacking in scholarly qualifications, but suggested that she had made an insufficient contribution to the college, for example, to its committees, and that her personality interfered with her teaching and colleagueship.[7]

Sweeney applied for promotion again to the 1975-76 FEAC and was successful. In the interim she had filed charges of sex discrimination, and at trial she expressed the view that the 1975-76 promotion was in response to that action, as "[e]verything else remained constant." Defendants emphasize, however, that in September 1975 Sweeney was made Director of the Education Department's reading program and that, in her November 1975 meeting with Redfern concerning the 1974-75 denial, Redfern said that her performance in that program might lead to her promotion. Defendants' position is that Sweeney had much stronger departmental support in 1975-76 than in 1974-75, in part because of her work in the reading program.

Defendants now contend, in essence, that Sweeney did not introduce evidence sufficient to prove that these reasons—which on their face are legitimate and nondiscriminatory—were pretexts for discrimination. Reminding us of the Supreme Court's admonition in *Furnco*, that proof of a prima facie case is not equivalent to a factual finding of discrimination, 438 U.S. at 576, 579, defendants argue that Sweeney did no more than present a "generalized inference of

[7] The reasons were summarized well by President Redfern. Called by Sweeney, he agreed during direct examination that the reasons were "subjective" and "judgmental," that they had no relationship to whether she had a terminal degree or to her scholarly research, that "in terms of the Faculty Manual criteria these might be more related to the process of maturity" and that they essentially dealt with Sweeney's personality "as reflected in the specified types of professional activities, such as committee work."

discrimination," through statistics showing an imbalance of male faculty and the like, and that she failed to disprove specifically the reasons given for her non-promotion during 1974-75. While the case is close, we disagree: the record contains evidence sufficient to support a finding that the reasons advanced were not the real reasons for Sweeney's non-promotion in the year in question.

Contrary to the reasons that allegedly prompted the 1974-75 FEAC not to recommend her, Sweeney introduced significant evidence that she had worked well with a variety of people in a variety of roles and contexts, and that her personality did not impede her effectiveness as a teacher or as a member of the faculty. The College itself had granted her tenure in 1972, indicating that whatever attitudinal problems Sweeney had[8] were not an obstacle to her becoming a permanent member of the faculty.[9] In addition, several witnesses who were qualified to judge testified as to Sweeney's flexibility and skills. At least four persons who knew her well and had had occasion to work closely with her in group endeavors testified that she was open to new ideas, that she was not rigid, inflexible or intolerant, and that she did not personalize professional matters. Although her only college-wide committee membership was as departmental representative to the College Senate, it was brought out that by 1974 she had served on the Senate's Admissions and Standards Subcommittee, as secretary to her own department, as a member of her department's curriculum committee, and as faculty advisor to two organizations. She had been active in supervising student teaching and had been

[8] Dr. Blacketor, Chair of the Education Department in 1972, in recommending Sweeney for tenure did acknowledge some problems in "her personal and professional attitude" when she first joined the faculty, but stated that she had shown significant improvement in 1970-71 and 1971-72.

[9] Keene State considers the tenure decision the most important in the careers of its faculty members, because it effectively confers lifetime employment.

on the New Hampshire Board of Education's Professional Standards Board, for which she had served as chair of the Subcommittee on Appeals and as a member of the Subcommittee on Provisional Certification. A number of the witnesses who testified on her behalf had worked successfully with her on one or the other of these committees.

There also was testimony that Sweeney was at least as qualified as others who had been promoted to full professorship, and testimony as to a general perception of sex bias at Keene State. Various witnesses compared Sweeney's qualifications to those of other members of the faculty, both male and female, and indicated that, although she was not one of Keene State's "superstars," she did rank among the better members of the faculty.

The documentary evidence shows that when, in the next year, the 1975-76 FEAC recommended Sweeney for promotion, it did not, as defendants would have it, give special weight to her contributions to the reading program. Both Alfred Thomas, Chair of the Education Department that year, and FEAC mentioned this contribution as only one of many reasons for promotion; her personal attributes and qualifications in 1975-76 seem little different from those in 1974-75.[10] The Dean, moreover, made no reference at all to

[10] In its memorandum recommending Sweeney's promotion to the Dean, FEAC said,

> "The committee has reviewed the promotion material presented in [sic] behalf of Miss Sweeney and was impress-d [sic] with her ability as a member of the instruction staff, indicated by her teaching index of 3.99 [out of 5]. Her promotion carries the full endorsement of the Education Department F.E.A.C. She has been a member of the College Senate, has served on several college committees and has, in addition, been a member of the Professional Standards Board for the State of New Hampshire, serving as Chairman of the Professional Standards Appeal Board for four terms.
>
> "Miss Sweeney has published and is a willing contributor to faculty and students interested in research. Her professional

the reading program, but rather spoke generally of Sweeney's good teaching evaluations and of her "good record of service to her department and to the College," and noted that she had served on the New Hampshire Professional Standards Board—a position that she had held since 1970. *See* 569 F.2d at 178 n.18.

Defendants argue that Sweeney did no more than show that differences of opinion existed between members of the faculty at Keene and that she did not show that the 1974-75 FEAC acted out of sex bias. We fully agree that the issue is not whether Sweeney was qualified for promotion or should have been promoted in 1974-75 by some objective measure, but whether she was denied a promotion because of her sex. *Loeb*, slip op. at 16. The recommendation of the 1974-75 FEAC is entitled to stand even if it appears to have been misguided, unless it was sex biased. *Loeb*, slip op. at 11 n.6, 16.

While Keene State's faculty members were entitled to hold different opinions as to Sweeney's qualifications, the evidence and testimony just reviewed suggests that more than just differences of opinion were involved. The defendants' alleged reasons border on describing Sweeney as, to quote plaintiff's brief, a "schoolmarm." The focus on her alleged attention to the height of window shades in particular seems a trivial comment. In light of the evidence that Sweeney's personality was

activities include membership in several national and regional associations with participation in convention programs. She has also contributed to the College by successfully submitting a grant for the Right to Read Program. She has also been recognized for her professional competency by being selected as a member on accreditation teams at the state, regional and national levels."

Aside from the reference to the Right to Read grant, substantially the same statement could have been made of Sweeney in 1974-75.

not as described by Redfern and did not interfere with her ability to work on committees or with people, the district court could have concluded that the five male members of FEAC would not have fastened upon such reasons had Sweeney been a man.

The nature of the reasons given, and the evidence introduced to show that they were either insubstantial or fictitious, stood with more general evidence suggesting that women at Keene State were evaluated by a stricter standard than their male colleagues, and that the institution generally was unresponsive to the concerns of its female faculty. Much of this evidence—such as the statistical composition of the faculty[11] and the attitude of the affirmative action officer—is recounted in our original opinion, 569 F.2d at 178-79. While by itself it does not prove that Sweeney in particular was a victim of discrimination, it does add "color" to the decision-making process at Keene State and to the reasons given for Sweeney's nonpromotion. Proof of a general atmosphere of discrimination is not the equivalent of proof of discrimination against an individual, but evidence of such an atmosphere may be considered along with any other evidence bearing on motive in deciding whether a Title VII plaintiff has met her burden of

[11] The statistical evidence was relevant, although it could not be conclusive of discrimination against Sweeney. The absence of women in the upper ranks at Keene State was not projected back in time and tied to their availabilty for appointment to the lower ranks in the different disciplines in earlier years. Moreover, the existence of a statistical disparity, while often helpful in establishing a prima facie case of discrimination, does not by itself meet an individual's burden of proving that the reasons given by the employer were pretexts, *Furnco* 438 U.S. at 579-80. Nevertheless, the statistics here were striking enough and covered a sufficiently long period of time (*i.e.*, the usual time in rank for the various ranks) as to constitute some evidence of bias. *See McDonnell Douglas*, 411 U.S. at 805 (statistics . . . may be helpful to a determination of whether petitioner's refusal to rehire respondent . . . conformed to a general pattern of discrimination against blacks"); *Furnco*, 438 U.S. at 580 (composition of workforce "is not wholly irrelevant on the issue of intent").

showing that the defendants' reasons are pretexts. *See Furnco*, 438 U.S. at 580; *Loeb*, slip op. at 17 n.14. We think that it was open to the court to conclude from the totality of the evidence that the reasons given for Sweeney's nonpromotion in 1974-75 were implicitly influenced by the fact that Sweeney was a woman.

Defendants emphasize that the promotion system at Keene relies on peer group support, and that Sweeney lacked the support of Dr. St. John, the Education Department Chairman,[12] as well as of FEAC in 1974-75. They argue that there was no evidence that Sweeney did not have their support because she was a woman. We disagree. Although there was no direct evidence, we think that the district court could have inferred

[12] When Dr. St. John wrote to Dean Davis stating that Sweeney had asked to be promoted to full professor and that the Education Department Advisory Committee on Promotion had recommended her, he also stated that he had "completely ambivalent feelings" about Sweeney's application, listed six "pros" and six "cons"," declined to recommend personally for or against, noted that the Advisory Committee had been unable to obtain Sweeney's personnel file from the Dean, and stated that she was "entitled to a fair and impartial judgment."

Defendants state repeatedly in their brief that the Education Department "did not consider" Sweeney in 1974-75, that Sweeney "did not have the positive support in 1974-75 of her department," and that in 1975-76, when she finally had the support of her department, department chairman and FEAC, she was promoted. We find this line of argument misleading. The record shows that applicants for promotion were considered by their department evaluation committees, which in turn made recommendations to the department chairmen, who forwarded the applications to FEAC. In both 1974-75, by Dr. St. John's own admission, and in 1975-76, Sweeney had the support of her department's evaluation committee. The significant difference was that the 1974-75 department chairman did not endorse the committee's recommendation, whereas the 1975-76 chairman did. The district court could have concluded that St. John undermined the committee's recommendation and, on the basis of the evidence reviewed herein, that his criticism of Sweeney was determined by a subtle, if unexpressed, bias against women faculty.

that FEAC and Dr. St. John were sex biased in light of the nature and weakness of the reasons given for her nonpromotion coupled with the evidence of the statistical composition and general character of the institution and of the insensitivity of many—including St. John—to the concerns of the female faculty.[13]

Defendants make much of the fact that the 1974-75 FEAC recommended one man and one woman for full professorship and did not recommend two men in addition to Sweeney. They also call attention to the fact that the 1974-75 FEAC considered the applications of twenty-five men and six women for tenure and/or promotion, and acted favorably toward all women except Sweeney, but toward only twelve of the twenty-five men. This information obviously bears on the question of discrimination, but it does not render the district court's conclusion clearly erroneous. Of the five women promoted by the 1974-75 FEAC, only one, Janet Grayson, was promoted to full professor; a defendant's willingness to appoint women to lower ranks does not preclude a finding that a woman who sought promotion to a higher rank was discriminated against. Nor does the promotion of one woman of admittedly outstanding credentials to full professor and the denial of such a promotion to two men preclude a finding that another woman was denied the same position because of sex. One familiar aspect of sex discrimination is the practice,

[13] For example, Eleanor Vanderhagen testified that Dr. St. John was involved in the publication of a newsletter by the Education Department that carried an announcement about an all-male honor education fraternity. When Vanderhagen wrote to him "pointing out its role in professional advancement for careers for men and women" and tried to meet with him to discuss her feeling that this was "inappropriate for a college publication," St John replied that he was "unavailable" and left a message that he "considered the whole thing trivial." There was also evidence, which the court below was entitled to credit, that St. John was condescending toward women and had been discourteous to Sweeney from the first time they met.

whether conscious or unconscious, of subjecting women to higher standards of evaluation than are applied to their male counterparts. The district court could have concluded consistently that Grayson merited promotion by any standard, that Sweeney was better qualified than the two men who were denied promotion, and that Sweeney would have been promoted had she been evaluated against the standard that was applied generally to men.

Defendants have persuaded us that this was a close case, but not that the district court committed clear error in concluding that Sweeney was denied a promotion because of her sex.

The judgment of the district court is affirmed.

APPENDIX F

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

Civil Action No. 75-182

CHRISTINE M. SWEENEY

v.

BOARD OF TRUSTEES OF KEENE STATE COLLEGE, ET AL

OPINION

This is a sex discrimination case in which the plaintiff alleges that the defendants refused to promote her and have underpaid her because she is a woman.

The action was originally brought pursuant to:

a. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., (hereinafter "Title VII") providing for injunctive and other relief against discrimination in employment on the basis of race, religion, sex and national origin.

b. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.,* (hereinafter "Title IX") prohibiting sex discrimination in certain federally funded education programs.

c. Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.,* as amended by the Equal Pay Act of 1963, 29 U.S.C. § 206(d), providing for equal pay for men and women.

The pleadings were subsequently amended to add a count under 42 U.S.C. § 1983 and the Fourteenth Amendment to the United States Constitution.

I rule as a matter of law that neither Title IX of the Education Amendments Act of 1972, 20 U.S.C. § 1681 *et seq.,* nor the Fair Labor Standards Act of 1938, 29 U.S.C. § 201 *et seq.,* as amended by the Equal Pay Act of 1963, 29 U.S.C. § 206(d), are applicable to this action.

I find that there was no violation of the plaintiff's rights under 42 U.S.C. § 1983.

Although I can find no specific amendment to the pleadings, the plaintiff has suggested that there is a violation of 42 U.S.C. § 1985. I find and rule that there was no violation of 42 U.S.C. § 1985 and it is not applicable in this case.

Jurisdiction is pursuant to 42 U.S.C. § 2000e-5(f)(1)(A) (Title VII). I find that the plaintiff has complied with all of the procedural requirements of Title VII.

In order to prevail, the plaintiff must establish a *prima facie* case of discrimination. Once that it done, the burden shifts to the defendants to show a non-discriminatory motive. The burden then shifts back to the plaintiff to show that the rebuttal is pretextual. *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 804 (1973).

I now examine the testimony and the exhibits in the light of this test.

THE FACTS

The Parties

Plaintiff is a woman who has been employed by the defendants at Keene State College in the Department of Education as an associate professor from January 1, 1969, through July 1, 1976, and as a full professor from July 1, 1976, to date. The defendant Board of Trustees of the University of New Hampshire is the body which administers Keene State College and the University system of the State of New Hampshire. The defendant Keene State College is designated as a division of the University of New Hampshire. The defendant Leo F. Redfern is President of Keene State College. The defendant Clarence Davis was the Dean of Keene State College until April 23, 1975, when he resigned and resumed teaching. The defendant Richard A. Gustafson was the Acting Dean of the College as of April 23, 1975.

The plaintiff received a Bachelor of Education degree from Keene State College in 1943, a Master of Arts from Catholic University in 1956, and a Doctorate in Philosophy (Ph.D.) from Catholic University in 1962. All degrees were in the field of education. Between 1943 and 1956, she taught at the primary and secondary school levels. She taught graduate and undergraduate level courses from 1961 to 1965 at Catholic University and undergraduate courses at Emmanuel College, Boston, Massachusetts, from 1965 to 1968. She was promoted to the position of Associate Professor at Emmanuel College, effective July 1, 1968.

Plaintiff left Catholic University in 1965 to take a position at Emmanuel College. The reason for the change was that she had a home in Keene, New Hampshire, where she was raised and she wanted to get back to her native New England. While at Emmanuel, she taught and was Director of Student Teaching and was elected to Kappa Gamma, an honor society for women. She also was on a committee which worked with representatives of Wheelock and Simmons Colleges to establish a curriculum laboratory.

Plaintiff held no teaching position in the fall of 1968. She started at Keene State College in January of 1969 as an associate professor at a salary of $5,000 for the spring semester. The reason she left Emmanuel for Keene was to live again in her home town. She also received about one thousand dollars more a year in salary at Keene than she would have at Emmanuel.

When plaintiff started at Keene, she had an understanding with Dr. Paul Blacketor, Chairman of the Department of Education, that during the spring term her area of responsibility would be as Supervisor of Student Teaching and that, after that, she could select her own courses and concentrate on teaching.

From January of 1969 through the summer of 1971, the plaintiff performed her duties at the College competently

and without any untoward difficulties. She carried the same teaching load as males at her level and she was involved in at least the normal amount of committee work on the campus and extracurricular activities expected of an associate professor. She was well thought of by the Chairman and her colleagues in the Education department.

The English Trip

The first real snag in the plaintiff's career occurred in August of 1971 when the Dean of College advised Dr. Blacketor, plaintiff's department head, that he would not approve the plaintiff accompanying students on a foreign exchange visit to England. Since the "English Trip" matter looms large in this case, it is necessary to go into it in some detail.

An exchange student teachers' program had been instituted in 1970 between Keene and several English schools. Students from Keene went to England for a semester accompanied by a faculty advisor, and English students came to Keene. The program was a college credit course which had been developed by the Education Department. It was first limited to student teachers, but later expanded to other departments of the College. The coordinator of the program was Nancy Stuart, an assistant or associate professor in the English Department. A selection committee within the Department of Education selected faculty advisors for the trips from those who submitted applications. Two trips were taken in the spring of 1971, both under the aegis of male faculty advisors.

Plaintiff had been Chairperson of the Foreign Studies Committee the year before the exchange program was put into effect and was unanimously nominated in the spring of 1971 as faculty advisor for the first of two trips scheduled for that fall. Dr. Rousseau, a male, was recommended as an advisor for the second trip and a Mrs. Nelson was

named as an alternative in case either the plaintiff or Dr. Rousseau were unable to make the trip or in the event that a third trip could be scheduled. Anticipating that she would be spending the fall semester in England, the plaintiff taught during the summer session of 1971. She also made plans to go to England for a personal visit to relatives at the end of the summer session. On the last day of the summer term, Dr. Blacketor called her and informed her that the Dean of the College had not approved her nomination as Faculty Advisor for the fall trip to England, but had appointed Mrs. Nelson to go in her stead. He told her that no reasons had been given by Dean Davis for this action. Dean Davis adamantly refused to give his reasons to the plaintiff or any other faculty members who inquired of him except that he did state the reasons for his refusal to the President of the College at a much later date. There is no doubt that the Dean of the College had veto and final appointive power as to trip faculty advisors.

While this stubborn and unexplained refusal on the part of the Dean to articulate the reasons for refusing to allow the plaintiff to accompany student teachers to England does not rise to the level of a constitutional due process violation, it strongly suggests that his reasons were petty and personal. Vetoing the trip on which the plaintiff had planned at the very last minute was bad enough, but to refuse to explain such action was bound to cause resentment and anger on her part. The plaintiff, not unnaturally, felt that she was the victim of discrimination.

After learning of the Dean's action, the plaintiff made an appointment to see the President of the College, but he cancelled the appointment after he learned the purpose for it. The President felt that the plaintiff's problem was a matter to be resolved between her and the Dean of the College and that he, as President, should not get involved.

When the plaintiff resumed her teaching duties in the

fall of 1971, she sensed a different atmosphere in the Education Department. She was excluded from foreign student affairs and from the English exchange program. She feels that the English Trip veto had an adverse effect on her educational career and was the prime reason for her failure to get promoted. The plaintiff was the only member of the faculty who was vetoed by the Dean after a unanimous nomination by faculty colleagues.

Tenure

Dr. Blacketor, Chairman of plaintiff's department, recommended that she be given tenure and a salary increase effective July 1, 1972. Blacketor's letters of recommendation, Exhibits 42 and 43, can hardly be characterized as enthusiastic. He testified, in effect, that they were intentionally deprecatory because he felt that a strong recommendation would evoke opposition from Dean Davis. In any event, the plaintiff was unanimously recommended for tenure by the 1971-72 Faculty Evaluation Advisory Committee (FEAC). Dean Davis concurred and she was granted tenure as of July 1, 1972. I take judicial notice of the fact that obtaining tenure is one of the most important steps in a teaching career because, for all practical purposes, it is a guarantee of employment at the institution where tenure has been granted.

Promotion

Before detailing the facts relative to plaintiff's attempts to attain the status of full professor, it is necessary to outline the collegial system of promotion in effect at Keene. The first step is a recommendation from the department chairman which is forwarded to the Dean of the College. He, in turn, sends it to the FEAC. This committee, which is independently elected, makes a study and evaluation of the record and qualifications of the applicant and then recommends to the Dean either for or against promotion. The Dean, in turn, makes his recommendation to the Board of Trustees whose decision is final.

An appeal from an unfavorable decision starts with the chairman of the department, then goes to the Dean, and then to the Faculty Appeals Committee (FAC) (formerly Personnel Welfare Committee). The jurisdiction of this committee, whose members, like FEAC, are elected by the faculty, is limited to determining whether or not due process has been observed and whether or not new, relevant and significant evidence has emerged that would substantially effect the case. After FAC has made its determination, the case is then sent to the President of the College and, if called for, to the Board of Trustees.

The plaintiff was recommended for promotion to full Professor by the Department of Education and its Chairman, Dr. Blacketor, during the 1972-73 school year. Dr. Blacketor's memo supporting her promotion application was much more supportive than the ones given when she applied for tenure, but cannot be characterized as enthusiastic. Exhibit 4. FEAC, which was composed entirely of males, recommended 5 to 0 against promotion. No reasons were given to the plaintiff or to Dr. Blacketor for this decision. On March 26, 1973, Dean Davis advised the plaintiff that he concurred with FEAC's recommendation and offered to discuss the matter with her. Exhibit 5. The plaintiff met with the Dean on or about April 3, 1973. Dean Davis did not specifically recall the meeting, but did not deny that it took place. At the meeting, the Dean told the plaintiff that he did not know the reasons FEAC had recommended against promotion, but advised her that, if she wished to appeal, she should get letters of recommendation, which she did. Exhibit 7. At this meeting, the plaintiff took the opportunity to ask Dean Davis for the reasons he had refused her permission to go on the English

Trip. The only reply she got was that he did not have to give her the reasons.

On July 28, 1973, plaintiff appealed to FAC (then called Personnel Welfare Committee). No decision was rendered by FAC until March 19, 1974, at which time the committee issued a three and one-half page summary of what it had done and its recommendation. Exhibit 12. The salient points made by FAC are as follows. It met with two members of FEAC who had evaluated the plaintiff, but could get no reasons for the negative recommendation. It met with the plaintiff to get her side of the case and then met with Dean Davis. The question of the English Trip came up and the Dean made it clear to FAC that he reserved the right not to disclose the reasons for his veto either to FAC or the plaintiff. The English Trip was also discussed by FAC with Dr. Blacketor. By this time, there was a new Chairman of the Education Department, Dr. Walter St. John, and certain aspects of the plaintiff's case were discussed with him. Because of her pending appeal, the plaintiff had decided not to request promotion for the academic year 1973-74. FAC made the following recommendation.

> After due consideration of the various factors and information that has been brought to the attention of the *Faculty Appeals Committee* it is the recommendation of the *Committee* that the appellant be given consideration by this year's FEAC committee for possible promotion from Associate to Full Professor. The *Committee* feels that it was a mistake on the part of the appellant not to request consideration for promotion during the current academic year and that this mistake be remedied as it appears to have been made on the false premise that an appeal of a past decision by FEAC could not take place at the same time that a faculty member might be under current consideration

> by a FEAC committee. The appellant's case is not at all clear cut. However, it is evident that the conflicting testimony in the "England matter" as well as the unwillingness of the Dean of the College to share either with the *Committee* or with the appellant the reasons she was not approved as a Faculty advisor to students going to England gives some modest substantiation to the appellant's claim that she was unfairly treated at least to the extent that it was unclear to the *Committee* why the appellant was dealt with in the way she was in this matter. Again, the *Committee* has no way of knowing to what extent such events may or may not have figured in last year's FEAC decision on her candidacy for promotion, as the *Committee* was not able to crack the secrecy barrier surrounding FEAC's decision and the basis upon which it was made. The *Committee* is inclined to give the appellant the benefit of the doubt to the extent that, although the *Committee* does not recommend that last year's FEAC decision be overturned, the *Committee* does strongly recommend that her candidacy for promotion be considered by this year's FEAC committee even if this means that she present herself for promotion to avoid going through the extensive visitation procedure required by her present Depart — [sic] Chairman. If the time limitation for promotional consideration can be waived on the basis of extenuating circumstances, and thereby allow for the visitation stipulations of the present Education Department chairman be met, the *Committee* would recommend that the appellant be given consideration as a candidate for promotion by this year's FEAC committee sometime later during the current Spring Semester. Whether the appellant would be willing to go ahead with a promotion candidacy under either of these provisions is unknown to

the *Committee* as the *Committee* has not discussed its recommendations with the appellant. Exhibit 12.

President Redfern, in a letter dated April 16, 1974, denied the request of FAC that the plaintiff be considered for a promotion in 1974. His reason was that FAC had exceeded its jurisdiction in making the recommendation since its only authority was to determine whether the decision of FEAC and the Dean was arbitrary and capricious.

At the trial, Dr. Smart, Chairman of the FEAC, who evaluated the plaintiff for promotion, testified that one of the reasons that she was turned down was the poor quality of her application. He stated that it was the worst one he had ever seen because it contained six grammatical errors and at least one dozen "typo" mistakes. He testified further that her record revealed "a total absence of anything positive for promotion, that there was a total lack of meritorious peformance and that her committee work was small and not campus wide." He also noted that she had not published.

In contrast, Sherman Lovering, an associate professor and director of the Testing Center and a member of FEAC in 1971-72, the year before plaintiff's promotion came up, testified that the plaintiff had all of the qualifications for promotion to full professor. He stated custom dictated that, if you had a Ph.D. and the requisite time in rank, promotion to a full professorship was automatic. He agreed with the FAC report and said that it was of great concern to him that plaintiff was not told of the reasons by FEAC for its negative recommendation and no explanation was given her for the Dean's refusal to allow her to go to England.

On April 29, 1974, plaintiff filed charges of discrimination with the New Hampshire Commission for Human Rights. Exhibits 51 and 52. It must be noted here that the plaintiff had not complained to anyone or any committee

on the campus that she felt that sex discrimination was the reason for the refusal to promote her. It was not until July 22, 1975, that she made a formal accusation of sex discrimination directly to the College. Exhibit 31. On May 21, 1974, however, she met with James Hobart, Director of Administration for the College, relative to a fourteen page questionnaire sent to him by the New Hampshire Commission for Human Rights. Exhibit 72. Her charges were, therefore, known to the administration in May of 1974.

On June 11, 1974, Professor Felton, Chairman of FAC, sent a memo to Hobart suggesting that the committee meet again to reconsider the appeal of the plaintiff because President Redfern's response to its report "brought out some additional conflicting testimony that the Committee was not aware of during its investigation of the case and, therefore, not included in the report of the Committee on the Sweeney case." Exhibit 15. Professor Felton sent this memo after he had "circularized the committee" advising them of plaintiff's complaint to the Human Rights Commission. Hobart did not reply to this memo.

Plaintiff was again considered for promotion during the 1974-75 academic year. A new FEAC committee, composed entirely of males, voted 5 to 0 against promotion. Dean Davis again concurred with the recommendation but, this time, stated the reasons.

> I have now reviewed your promotion situation and have consulted with FEAC after receiving their recommendation against the promotion.
>
> I am concurring with their advice. This decision is based upon the evaluation of FEAC which indicates that you have not fulfilled the qualifications as stated in the Faculty Manual; namely, that your teaching and research has not been "marked by the perspective of maturity and experience, or by some creative attribute generally recognizable in the academic world as a special asset to a faculty." Exhibit 19.

Plaintiff asked FEAC to reconsider, but it voted 5 to 0 against reconsideration.

In his testimony, Dr. Quirk, Chairman of this FEAC, stated that the plaintiff had an extremely weak case for promotion and that the committee found her deficient in teaching effectiveness, scholarly qualification, and contributions to the College.

Plaintiff appealed to FAC and supplied it with additional information and charged that she had been denied due process of law and was discriminated against because of her sex. Exhibits 30 and 31. FAC, which was chaired by Janet Grayson, sent a lengthy letter to Dr. Redfern stating that it was sympathetic to the plaintiff, that she had been subjected to unreasonable provocation because she was never given the reasons for the English Trip decision, and that the Dean was negligent for his failure to give plaintiff adequate reasons for the decisions against promotion. The letter further stated: "We are united in the view that the dean *must* give Dr. Sweeney reasons for denying her promotion." The letter concluded: "Although we did not find evidence to support her charge of discrimination because of sex, we are concerned that she had to endure unprofessional treatment within her department and by the administration." Exhibit 32.

The plaintiff was recommended for promotion again during the academic year 1975-76. This time, FEAC voted 5 to 0 in favor of promotion, effective July 1, 1976. The Chairman of this FEAC was Dr. Blacketor and one of the members was a woman. Professor Whybrew, who had replaced Professor Davis as Acting Dean of the College, approved the recommendation as did the Board of Trustees, and the plaintiff became a full professor on July 1, 1976.

Testimony of Dean Davis

While Dean Davis' refusal to give plaintiff the reasons for his veto of the English Trip was, in my opinion, a mistake and may be evidence of discrimination against the plaintiff for personal reasons, it is not evidence of sex discrimination. Not only was the replacement for the plaintiff a woman, but Dean Davis' unrebutted testimony was that, in making this decision, he relied on the advice of the coordinator of the program, Nancy Stuart, who was of the opinion that Mrs. Nelson had superior capabilities for establishing rapport and prestige with the English schools. A decision to replace one woman with another woman based on the advice of a third woman is hardly an indicia of discrimination against females. It is true that Dean Davis turned the plaintiff down twice for promotion, but on both occasions he was acting in accord with the unanimous recommendation of FEAC. He had previously approved the unanimous recommendation of FEAC that she be granted tenure. Whatever personal animus Dean Davis may have had against the plaintiff, there is no evidence that it was sex based.

The only evidence of sex bias on the part of Davis is his passive role in Keene's affirmative action program. He was not aware that, as Dean, he was the affirmative action officer for the faculty and he made no special effort to see to it that women took part in the promotion process.

Testimony of President Redfern

According to his testimony, President Redfern's role in the promotion process as President of the College is to serve passively in an appellate function. He determines whether or not the recommendation of FEAC and the Dean was made in conformance with good academic standards and whether or not the applicant was afforded due process.

In his memo of April 16, 1974, in reply to FAC's report, he noted that: "Actually, five years at the rank of associate professor is not deemed excessive by normal academic standards." Exhibit 14.

As President of the College, Redfern has the duty to see to it that the affirmative action plan is implemented. He plays a leadership role on the campus, preaches and cajoles in an effort to see to it that there is no discrimination. There was no evidence that Redfern made any specific efforts to upgrade or advance the status of women on campus in any way.

It was Redfern's opinion that the scattergram of salaries, Exhibit P, did not show any discrepancies between women and men. This opinion is contrary to Exhibits 67, 68 and 69 which show that males received higher average salaries than females in all the grades for the years, 1971-72, 72-73, 73-74, 74-75 and 75-76. The only exception was for associate professors in 1975-76, in which year the average salary of females was $15,864 and that of males, $15,419. In the years 1969-70 and 1970-71, the average salary of female professors was higher than that of males, but this was due to the fact that in those years there was only one female professor who had a great deal of longevity and whom everybody agrees was a superb teacher.

President Redfern testified that the College is now promoting women at the instruction level at a higher rate than men, but after that, the promotion rate favors men. This differential was explained on the grounds that, until recently, the faculty had a ratio of four or five males to one female. At the present time, four out of twelve department heads are women: foreign languages, home economics, physical education and music. There are two female full professors, Dr. Grayson and the plaintiff. The College has the only woman athletic director of a coeducational college, Dr. Sherry Bovinet. The evidence also shows that Dr. Bovinet had difficulty in obtaining a promotion to Associate Professor. Exhibit R.

Testimony of Norma Walker

Ms. Walker is an assistant professor at the College. She came to Keene in the summer of 1972 and teaches early childhood and reading courses. She has shared an office with the plaintiff since 1975 when the plaintiff took over as Director of the Reading Program. Her testimony was laudatory of the plaintiff as a professional colleague and as a person. She rebutted the charges that the plaintiff was rigid and had narrow views. Exhibit 48. The only part of her testimony bearing on sex discrimination was that the plaintiff carries a heavier teaching load than the male who also works in the reading department.

Testimony of Eleanor Vander Hagen

Professor Vander Hagen was one of the key witnesses for the plaintiff, although she explicitly stated that she made no judgment as to the plaintiff's case. Ms. Vander Hagen came to Keene in 1972. She is Assistant Professor in Sociology, Assistant to the President and Director of the Grant Program. In her opinion, the entire collegial process of promotion discriminates against women. The process, which she characterized as being run like an "old boys club," works best for those who get along with the power structure which, because of historical factors, is dominated by men. In her opinion, there is no awareness by men that they discriminate against women. As an example of different standards being applied, she said that Dr. Janet Grayson had far above average qualifications and it took her years to be promoted while, at the same time, men with inferior qualifications were being promoted perfunctorily. It was Professor Vander Hagen's opinion that the personal life of a woman is a factor in tenure and promotion while it is not for men. Vander Hagen pointed out that the student body at the College is 60% women and, for this reason, there should be more women full professors

since they perform an important function as "role models" for the female students.

Professor Vander Hagen testified that there are no channels at Keene for concern about sex discrimination and that the administration treats the affirmative action program as a burden. In her opinion, the administration fails to recognize that sex discrimination against female faculty members does exist at Keene.

On cross-examination, Professor Vander Hagen admitted, in effect, that Keene reflects the traditional societal bias against women. She feels that women are disadvantaged as a group because of social categories. She agreed that all colleges, except proprietary ones, use the collegial system for tenure and promotion. Professor Vander Hagen did state that some men could be educated to understand the problems of women.

Testimony of James Hobart

Mr. Hobart has been Director of Administration at the College since 1972, and Coordinator of the Affirmative Action Program since 1973. His duty as Coordinator of the Affirmative Action Program was to develop a plan for affirmative action. The College, however, never adopted a plan directed specifically to itself as a separate entity. In 1976, an action plan was adopted by the Trustees as part of a statewide university system plan. Exhibit 70. The main objective of this plan is to achieve faculty hiring goals for women and members of minority groups by 1981. The plan, however, has no specific provisions for promotion of women and minority groups. Nor does it have any specific provisions for equalization of salary vis-a-vis women and minority groups.

Hobart sees his role in the affirmative action program as that of providing information, monitoring complaints and arranging meetings. It was his opinion that he ought

not to make judgments as to whether or not there are actual instances of discrimination and that he should not actively support an individual who might have been discriminated against. The plaintiff was the only person to whom he supplied information relative to sex discrimination. After the plaintiff had filed her complaint with the New Hampshire Commission on Human Rights, Hobart made no effort to determine if the claim was valid.

At the present time, a study is being conducted to determine whether or not there are salary inequities due to sex. The salaries of the faculty are studied and analyzed according to rank and every year a report is sent to the American Association of University Professors which studies and analyzes the information on a sex basis.

In March of 1975, he read the reply of the President of Smith College to a finding by the Massachusetts Commission Against Discrimination that Smith discriminated against females. President Mendenhall's reply was an open letter sent to all alumni. Hobart, who had known the President personally, wrote to him. An excerpt from Hobart's letter is revealing.

> One of your alumnae, Mrs. Andrea Scranton, has forwarded to me your Smith College Letter called "Smith College's Reply to the Decision of the Massachusetts Commission Against Discrimination." It was excellent and almost completely descriptive of a situation we are involved in with the New Hampshire Commission on Human Rights, in which a female associate professor, denied promotion to full professor (twice), is appealing to higher authority on the basis of sexual discrimination. While we felt that we were on strong ground, both on data and from a collegial standpoint, the actions of the Massachusetts Commission leave me gaping and concerned that that form of anarchy may creep north into our virgin territory.

> I would appreciate it very much if, when your lawyer prepares his presentation to the full Commission and/or to the Superior Court of Hampshire County, a copy of that presentation could be forwarded to my office for possible plagiarism in our presentation in response to what we expect may well be an adverse decision by our own Human Rights Commission. Exhibit 64.

Instead of determining whether or not there was sex discrimination at Keene, Hobart was more interested in framing a response to an expected adverse decision by the New Hamphire Human Rights Commission.

Hobart was of the opinion that the salaries of men and women are roughly equivalent considering that longevity plays an important role in the salary scale. Under the system in effect since 1966, an individual seeking an increase in salary makes his/her request to the faculty committee which, in turn, makes its recommendation to the Dean.

Testimony of Richard Gustafson

Professor Gustafson is Dean of the College now and was Acting Dean in the spring of 1975. After he received plaintiff's application for a review of the negative FEAC decision, he held a meeting with its Chairman, Professor Quirk, and asked if the plaintiff had furnished any additional materials. Since she had not, he decided to let FEAC's recommendation stand.

Testimony of Harvey Harkness

Harvey Harkness has been Director of Teacher Education and Professional Standards for the State of New Hampshire since 1968. He has known the plaintiff since 1970 when she became a member of the Professional Standards Board. This Board is advisory on all matters relative

to the preparation and continuing education of all students. Harkness found the plaintiff extremely competent, faithful and diligent and testified that she carried out all her assignments successfully. She was not, in his opinion, rigid, inflexible or intolerant of the ideas of others, the reasons Dr. Redfern had noted were the major factors in denying plaintiff a promotion in 1975. Exhibit 48.

Testimony of Professor Felton

William S. Felton, Jr., is Professor of Sociology at Keene, and was Chairman of FAC for the academic year 1973-74. The action that the committee took has already been detailed. It was his opinion that the plaintiff possessed credentials that would place her in the top third of the full professors on the faculty at that time. He agreed that judgment factors, as well as credentials, are involved in the promotion process.

Testimony of Sherman Lovering

Mr. Lovering's testimony has already been outlined. He emphatically denied that the Redfern Memo, Exhibit 48, was an accurate characterization of the plaintiff.

Testimony of Professor Blacketor

As Chairman of the Education Department, Professor Blacketor recommended the plaintiff for promotion to full professor. It was his opinion that, on a scale of one to ten, the plaintiff would rate as eight. Dr. Blacketor testified that there is sex discrimination in hiring practices at Keene. He based this on an analysis of certain programs in which there are no women at all. He also felt that there is sex discrimination as to salaries. It was his opinion that there was some discrimination relative to promotion and that this was due to the employment pattern. He testified also that there was no discrimination at all as far as working conditions were concerned.

Testimony of Professor Lyman

Professor Kathleen Dunn Lyman of Simmons College was the Plaintiff's expert witness. Based on her resume, Exhibit 80, and her testimony, I found that she was qualified to testify as an expert witness as to sex discrimination on college faculties. Dr. Lyman had access to all of the pertinent exhibits prior to testifying.

She was of the opinion, based on an analysis of the plaintiff's personnel file and those of others who were promoted, that the plaintiff was qualified to be promoted to full professor in 1973. She testified in detail about the plaintiff in comparison with other faculty members, to wit: Lyle, Lovering, Hastings, Layman, Laurie, Mosley, Jones, Felton, Davis and Havill. In her opinion, the plaintiff rated "very good" in the area of scholarly activities, and others who were promoted had no better record in this regard, *e.g.*, Felton, Mosley and Havill.

It was Dr. Lyman's opinion that plaintiff's work on campus and outside committees was fully comparable to those men promoted ahead of her. She pointed out that Professor Lohman, who, in Dr. Lyman's opinion, had comparable qualifications to the plaintiff, was promoted ahead of her, although he did not obtain the rank of associate professor until after the plaintiff.

Dr. Lyman further testified as to the application of the standards of promotion relative to men and women. She noted that, despite the fact that Professor Janet Grayson was an academic superstar, it took her a year longer to get promoted than less qualified men. She pointed out that Professor Ernest Lohman went from assistant professor to full professor in four years, half the time it took Professor Grayson. Dr. Lyman discussed the case of Professor Dorothy MacMillan and stated that seven men with less tenure and who were not as well qualified were promoted ahead of her.

It was Dr. Lyman's opinion that there was a pattern of sex discrimination in hiring, the promotion process, and salary scale. She pointed out that the decision making process at Keene was all male and that this resulted in men being favored in the majority of cases.

According to Professor Lyman, the 1976 affirmative action plan was inadequate. One of its faults is the failure to focus on promotion within the ranks.

On cross-examination, it was brought out that it is not unusual in any college to be rejected on the first try for promotion. It was also adduced that Professor Anne Peters had been the highest paid full professor at Keene for several years. Exhibit 69. Dr. Lyman was confronted on cross-examination with the names of several males who had the same or better qualifications as the plaintiff and whose promotion took as long or longer than the plaintiff, *i.e.*, Mosley, Smart, Cunningham and Hilderbrand. It was also pointed out that Professor Havill did not attain the rank of full professor until after Grayson, but got his Ph.D. sooner than she did and had more tenure than Grayson.

Testimony of James D. Smart

In addition to his testimony, *supra*, on the reason why the FEAC, of which he was Chairman, recommended against promotion of the plaintiff, Professor Smart testified that he taught a course in women's rights and that he was aware of women's issues. He further stated that tenure and promotion are not treated alike. They are two distinct processes with different criteria and, in his opinion, the promotion decision is easier to make than the one determining tenure. It must also be noted that the History Department, which he chairs, has seven men and no women.

Testimony of Professor Quirk

Professor Quirk was the last witness and his testimony has been largely covered since he was Chairman of FEAC in 1974-75. In addition to stating the reasons why he did not think the plaintiff was qualified to be promoted, he testified that, usually, the minimum time in rank for an associate professor before being eligible for promotion to full professorship is four years.

Specific Exhibits

Exhibit 58 is answers to plaintiff's interrogatories giving the numbers, sex and salary of the faculty of the defendant College from 1965 through 1966. My analysis of the figures, which does not include the Wheelock laboratory, the school library, student services auxilary enterprises or the administration, reveals the following.

In the academic year 1965-66, there were nine male full professors and one female, ten male associate professors and one female, four male assistant professors and five females, four male instructors and no females, and one female lecturer.

In 1966-67, there were eight male full professors and two females, nine male associate professors and one female, eleven male assistants and six females, three male instructors and three females, one male lecturer and two females.

The exhibit contained only blank sheets for the years 1967-68 and 1968-69.

In 1969-70, there were ten male full professors and one female, seventeen male associates and three females, twenty-eight male assistants and six females, seven male instructors and two females.

In 1970-71, there were fourteen male full professors and one female, twenty-three male associates and four females, thirty-eight male assistants and twelve females, five male instructors and three females.

In 1971-72, there were sixteen male full professors and two females, twenty-five male associates and two females, thirty-seven male assistants and eleven females, fourteen male instructors and four females.

In 1972-73, there were eighteen male full professors and one female, twenty-five male associates and three females, thirty-six male associates and ten females, ten male instructors and three females.

In 1973-74, there were twenty male full professors and one female, twenty-eight male associates and six females, thirty-eight male assistants and eight females, eleven male instructors and seven females.

In 1974-75, there were twenty-three male full professors and one female, thirty-two male associates and seven females, thirty-eight male assistants and five females, five male instructors and four females.

In 1975-76, there were twenty-three male full professors and two females, thirty-five male associates and six females, thirty-eight male assistants and seven females, three male instructors and three females.

I realize that these figures differ slightly from the figures given in defendant's answers to another set of interrogatories, Exhibit 59, but the difference is not significant. I may have miscounted the total number in one or two places. Both Exhibits 58 and 59 show a very marked disparity between the number of males and females in every rank except that of instructor. This certainly is evidence of sex discrimination in hiring and promotion.

An analysis of Exhibits 58, 59, 67, 68 and 69 shows that over the years, salaries have been weighted in favor of males over females. Professor Anne Peters is the sole exception to this. Part of this is undoubtedly due to the longevity factor which, in turn, is due to the fact that the number of males hired over the years has greatly exceeded that of females. Another factor that skews the salary

scale in favor of males is the fact that the defendant college has no objective salary standard and schedule. Under the system in effect, longevity and judgmental factors, which cannot be objectively determined, weigh heavily in determining the salary of individual members of the faculty. The salary of an individual faculty member, as well as his/her promotion, depends on the discretion and judgment of his/her superiors. While this is necessary in the promotion process, it should not play a large role in determining an individual's salary. Broad discretion inevitably leads to discrimination. *See particularly* Exhibit 77 relative to Ms. Goder in which the Personnel Welfare Committee stated:

> All the evidence available to the Committee supports the appeal of Ms. Goder and the statement of her chairman considering her past and present salary a "gross inequity." Ms. Goder appears to be the most qualified member of her department in terms of education, experience, and ability. She is in fact the only member of the department qualified to teach essential upper-division courses required of the new Music major. Her present salary is shockingly low.

Since, under the present system in effect at Keene, the ultimate decision on salary is largely determined by males, there is bound to be discrimination against females, especially if we give credence to the belief of Professors Vander Hagen and Lyman that most males have a built-in societal bias against females. The salary of an individual should depend as far as possible on longevity, rank and other objective criteria.

SPECIFIC FINDINGS

1. Dean Davis did not discriminate against the plaintiff by reason of her sex in refusing to approve her as a faculty advisor on the trip to England.

2. The evidence establishes a pattern of sex discrimination at Keene State College with regard to hiring, promotion and salary.

3. Those in charge of the affirmative action program have failed to act affirmatively on behalf of women with regard to hiring, promotion and salary.

4. Based on her qualifications, the length of time she had spent at the defendant College and her rapport with her colleagues, I find that the plaintiff would not have been promoted even if she were a male in the academic year 1972-73.

5. I find that, if she had been a male, plaintiff would have been promoted on her next attempt.

6. I find that it was not the fault of anyone in the administration or any department having to do with promotion that the plaintiff failed to apply for promotion in the academic year 1973-74.

7. I find that the reason the plaintiff was not promoted in the academic year 1974-75 was because of her sex.

8. The defendants have not rebutted the plaintiff's evidence that they did not discriminate against her by reason of her sex and have not proven that they had a non-discriminatory motive in failing to promote her in the academic year 1974-75.

9. I find that a double standard was applied for males and females in the promotion process. The evidence shows that there was and is a disproportionately small number of women in the high ranks of associate and full professors and particularly in the rank of full professor. This double standard also prevails in regard to hiring and salaries.

10. The defendants have not rebutted the plaintiff's evidence that they have discriminated against women generally in hiring, promotion and salary.

11. The affirmative action plan is inadequate, particularly in regard to promotion and salary.

12. The plaintiff has not proven that her salary as a full professor is less than that of other male professors with the same or similar qualifications and responsibilities.

13. The plaintiff has not proven that her salary as an associate professor was less than that of other male associate professors with the same qualifications and responsibilities.

WHEREFORE IT IS ORDERED that the plaintiff is entitled to a back dating of her promotion to July 1, 1975, with back pay as full Professor to that year at the salary scale that she would have started at in 1975 and reasonable attorney's fees and costs.

Plaintiff's counsel will submit within ten days a specification of reasonable attorney's fees and a bill of costs.

s/ HUGH H. BOWNES
United States District Judge

April 13, 1977

cc: JACK B. MIDDLETON, ESQ.
JOSEPH A. MILLIMET, ESQ.

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-778

BOARD OF TRUSTEES OF
KEENE STATE COLLEGE, ET AL.,
PETITIONERS,

v.

CHRISTINE M. SWEENEY,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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Opinions Below

The August 21, 1979 decision of the Court of Appeals is officially reported at 604 F.2d 106 and appears as Appendix E of the Petition for a Writ of Certiorari (hereinafter Pet. for Cert.). A prior decision of the Court of Appeals,

officially reported at 569 F.2d 169 (Appendix A of the first Pet. for Cert.), was vacated by the Supreme Court on November 13, 1978 (No. 77-1792). The Supreme Court's Order appears as Appendix A of the second Pet. for Cert.

The first decision of the District Court for the District of New Hampshire was not officially reported, but was unofficially reported at 14 FEP Cases 1220 (1977). Affirmed twice now by the Court of Appeals, the decision appeared as Appendix B of the first Pet. for Cert. It now appears as Appendix F of the second Pet. for Cert.

This Court granted certiorari, vacated the judgment of the Court of Appeals, and remanded the case for reconsideration by the Court of Appeals in a majority *per curiam* opinion in which four members of the court dissented. The opinion is officially reported at 439 U.S. 24, 58 L.Ed.2d 216, 99 S.Ct. 295 (1978) and appears as Appendix A of the Pet. for Cert.

By an order dated December 19, 1978, appearing as Appendix B of the Pet. for Cert., the Court of Appeals remanded the case to the District Court for further proceedings.

By orders dated January 29 and February 20, 1979, appearing as Appendix C and Appendix D of the Pet. for Cert., the District Court reaffirmed its original opinion and findings in all respects. None of those orders is officially reported.

Jurisdiction

The judgment of the Court of Appeals affirming the District Court's original judgment was entered on August 21, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Does the methodology for proving an individual Title VII discrimination claim established by *McDonnell Douglas* v. *Green* and *Furnco Construction Corp.* v. *Waters*[1] require abandoning the customary "clearly erroneous" standard in favor of *de novo* review of a District Court's finding of discrimination.

2. Can the defendants be heard to complain that the District Court upon remand made no additional findings when in fact defendants asked for none?

3. Does a *McDonnell Douglas* v. *Green – Furnco* analysis require direct evidence of discriminatory intent in an academic promotion case even though such a burden is not placed upon a plaintiff in any other employment discrimination context under Title VII?

Statute Involved

The substantive federal statute involved here is Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as amended by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103. The applicable provision, § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) reads:

> "Sec. 703(a). It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privi-

---

[1] *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 36 L.Ed. 668, 93 S.Ct. 1817 (1973); *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 57 L.Ed. 957, 98 S.Ct. 2943 (1978).

leges of employment, because of such individual's race, color, religion, sex, or national origin. . . .''

Statement of the Case

Respondent, Christine M. Sweeney (hereinafter plaintiff), has now twice succeeded before both the District Court and the Court of Appeals in demonstrating that she was denied promotion to full professor of education at Keene State College for the 1974-75 academic year because of her sex.[2] Both the District Court and the Court of Appeals announced in their original decisions that the controlling legal test was to be found in *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 36 L.Ed. 668, 93 S.Ct. 1817 (1973).[3] (F-2;[4] 569 F.2d at 177) The Court of Appeals

[2] Prior to instituting action in the District Court, the plaintiff had filed discrimination charges with the New Hampshire Commission for Human Rights and the EEOC (Equal Employment Opportunity Commission). After a lengthy investigation by the Commission, it found probable cause on May 2, 1975, as did the EEOC on October 19, 1976. (App. IV 121-22, Exs. 53, 54; see n. 4, *infra*). Although the original complaint asserted additional claims, these have been resolved. The remaining action focuses on Dr. Sweeney's promotion claim under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, as amended by the Equal Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103.

[3] Under *McDonnell Douglas,* an individual Title VII plaintiff may proceed by first establishing a ''prima facie case'' of discrimination; this then requires the defendant to ''articulate'' a legitimate, non-discriminatory reason for its adverse action regarding the plaintiff. To prevail, the plaintiff ultimately must prove that the reason given is a pretext for discrimination. *See* 411 U.S. at 802-05. *Furnco Construction Co.* v. *Waters,* 438 U.S. 567, 57 L.Ed. 2d 957,, 98 S.Ct. 2943 (1978), affirming the *McDonnell Douglas* methodology, had not yet been decided by this court.

[4] The appendices of the present Pet. for Cert. are cited as ''A'', ''B'', ''C'', etc. The appendix prepared for the second appeal to the Court of Appeals is cited as ''App.'' Appendices prepared for the first appeal, constituting Vol. I-IV, are referenced as ''App. I-IV'', etc.

affirmed the District Court's lengthy (26 pages in Appendix F, including 13 Specific Findings) decision in favor of the plaintiff in a detailed decision of its own.

What caused the Supreme Court to vacate the Court of Appeals' original decision was language accompanying the discussion of defendants' obligation to ''articulate'' a legitimate reason for Dr. Sweeney's non-promotion once plaintiff had established a prima facie case. The Court of Appeals stated that defendants were required ''to prove absence of discriminatory motive'' at the second phase of the test. 569 F.2d at 177. In remanding the case to the Court of Appeals, the Supreme Court reemphasized the language and rule of *McDonnell Douglas,* 411 U.S. at 802, and *Furnco Construction Corp.* v. *Waters,* 438 U.S. 567, 57 L.Ed.2d 957, 98 S.Ct. 2943 (1978), that a Title VII defendant need only ''articulate'' a valid reason, and indicated that defendants had done so. (A-1) The Court was concerned that the Court of Appeals had ''imposed a heavier burden on the employer than *Furnco* warrants.''[5] (A-2)

The Court of Appeals remanded the case to the District Court on December 19, 1978 (with First Circuit Court of Appeals Judge Hugh Bownes, who had heard the case as District Judge, sitting by designation) ''for further proceedings and reconsideration in the light of *Furnco*. . . .'' (App. 4) Although the Petitioners (hereinafter defendants) now strenuously complain that Judge Bownes made no additional ''subsidiary'' findings, they made no such request during the more than six weeks that the case was again before the District Court; in fact, from December 19,

[5] The four dissenting Justices (Justices Stevens, Brennan, Stuart and Marshall) took the position that there was no real distinction between ''articulat[ing] a nondiscriminatory reason'' and ''prov-[ing] absence of a nondiscriminatory motive,'' since, irrespective of the shifting burden of adducing evidence by submitting proof, the ultimate burden of persuasion rested with the plaintiff. (A-3-7)

1978 to February 7, 1979 (a date subsequent to Judge Bownes' second opinion), the defendants made *no request for a hearing or other proceeding* before the District Court. (D-1) However, Judge Bownes *did* reconsider the case in the light of *Furnco,* and issued an order, saying in part:

> Defendants did adduce evidence of legitimate nondiscriminatory reasons for not promoting plaintiff. Plaintiff then proved to my satisfaction that the basic reason for the failure to promote her was because of her sex, that the reasons advanced by the defendants were pretextual, and that plaintiff would have been promoted in the academic year 1974-75 but for the fact that she was a woman.
>
> My opinion an findings are in all respects reaffirmed. (C-1-2)

On February 26, the defendants filed a Notice of Appeal (App. 26), bringing the matter before the Court of Appeals for the second time.

The Court of Appeals said it would not, however, consider the evidence *de novo,* but would follow the standard appellate practice of not overturning the findings of the trial court unless "clearly erroneous." The reason given by the Court was that the trial judge was in a better position to judge credibility of witnesses "where the issue is whether 'personality' reasons were sexually biased." (E-3-4, & n. 2) However, the Court also said that it would look closely for infection in the Court's findings from legal error. (E-4, n. 2)

The Court of Appeals focused on the second and third stages of proof under the *McDonnell Douglas – Furnco* approach, namely whether the alleged reasons for Dr. Sweeney's non-promotion were a pretext for sex discrimination. Although Dr. Sweeney had the full support of her

peers in the Education Department, importantly she did not have the support of Department Chairman Walter St. John, when she applied for promotion for the 1974-75 academic year.[6] The Court of Appeals from its close review of the record found possible sex bias in Department Chairman St. John's perception of women faculty members:

> In both 1974-75, by Dr. St. John's own admission, and in 1975-76, Sweeney had the support of her department's evaluation committee. The significant difference was that the 1974-75 department chairman did not endorse the committee's recommendation, whereas the 1975-76 chairman did. The district court could have concluded that St. John undermined the committee's recommendation and, on the basis of the evidence reviewed herein, that his criticism of Sweeney was determined by a subtle, if unexpressed, bias against women faculty.
>
> . . .
>
> Eleanor Vanderhagen testified that Dr. St. John was involved in the publication of a newsletter by the Education Department that carried an announcement about an all-male honor education fraternity. When Vanderhagen wrote to him "pointing out its role in professional advancement for careers for men and women" and tried to meet with him to discuss her feeling that this was "inappropriate for a college publication," St. John replied that he was "unavailable" and left a message that he "considered the whole thing trivial." There was also evidence, which the court below was entitled to credit, that St. John was condescending toward women and had been discourteous to Sweeney from the first time they met. (E-12-13, n. 12 & n. 13)

---

[6] Dr. Sweeney had sought promotion for the 1972-73 academic year. Denial for that year is no longer an issue in this case. On her third try, for the 1975-76 academic year, she was successful.

At her next promotional hurdle, Dr. Sweeney encountered the all-male, senior faculty, FEAC (Faculty Evaluations Advisory Committee). They turned her down, saying only that she did not qualify. (E-5) Not until the FAC (Faculty Appeals Committee) insisted that she be given reasons for the adverse decision was the following "explanation" developed by President Redfern and Dean Davis, the ultimate decision-makers in the promotion process and among the defendants herein:

> The evidence shows that [President Redfern] told Sweeney that the reasons were largely personal ones: that the FEAC members thought that she "personalized professional matters," was rigid, narrow-minded, and inflexible, intolerant of students' views and "old fashioned" in her supervision of student teaching. Her alleged concern with the height of window shades was cited as an example.
>
> . . .
>
> The reasons given for the 1974-75 denial of Sweeney's promotion thus were, in essence, that Sweeney had a tendency to be narrow-minded and rigid, to personalize professional matters, and to be difficult to work with. (E-5-6)

The Court of Appeals then considered the question of *credibility*: were the reasons advanced by administration members for non-promotion the "real reasons" or were they mere pretexts? (E-7) Relevant to the court's conclusion that they were "pretexts" was Dr. Sweeney's testimony that her later promotion for the 1975-76 year was in response to her complaint of sex discrimination; testimony of faculty members that she was *not* rigid, old fashioned, or narrow-minded and did not personalize professional

matters; testimony that the College had already granted her tenure, indicating that the alleged "personality" problems had not impeded her from becoming a permanent faculty member; testimony that she was as well qualified for promotion by objective criteria (such as teaching ability, publications, and committee work) as men who were in fact promoted to the senior ranks; and testimony that her credentials were essentially unchanged from the year of her denial to the year of her promotion. (E-7-10)

The Court of Appeals observed:

> Defendants argue that Sweeney did no more than show that differences of opinion existed between members of the faculty at Keene and that she did not show that the 1974-75 FEAC acted out of sex bias. We fully agree that the issue is not whether Sweeney was qualified for promotion or should have been promoted in 1974-75 by some objective measure, but whether she was denied a promotion because of her sex. *Loeb* [v. *Textron, Inc.*, 600 F.2d 1003 (1st Cir. 1979)], slip op. at 16. The recommendation of the 1974-75 FEAC is entitled to stand even if it appears to have been misguided, unless it was sex biased. *Loeb*, slip op. at 11 n.6, 16.
>
> While Keene State's faculty members were entitled to hold different opinions as to Sweeney's qualifications, the evidence and testimony just reviewed suggests that more than just differences of opinion were involved. The defendants' alleged reasons border on describing Sweeney as, to quote plaintiff's brief, a "schoolmarm." The focus on her alleged attention to the height of window shades in particular seems a trivial comment. In light of the evidence that Sweeney's personality was not as described by Redfern and did

not interfere with her ability to work on committees or with people, the district court could have concluded that the five male members of FEAC would not have fastened upon such reasons had Sweeney been a man. (E-10-11)

The Court then focused on more general, administration-wide discrimination, which it said added "color" to the plaintiff's claim of discrimination:

> The nature of the reasons given, and the evidence introduced to show that they were either insubstantial or fictitious, stood with more general evidence suggesting that women at Keene State were evaluated by a stricter standard than their male colleagues, and that the institution generally was unresponsive to the concerns of its female faculty. Much of this evidence—such as the statistical composition of the faculty and the attitude of the affirmative action officer—is recounted in our original opinion, 569 F.2d at 178-79. While by itself it does not prove that Sweeney in particular was a victim of discrimination, it does add "color" to the decision-making process at Keene State and to the reasons given for Sweeney's non-promotion. Proof of a general atmosphere of discrimination is not the equivalent of proof of discrimination against an individual, but evidence of such an atmosphere may be considered along with any other evidence bearing on motive in deciding whether a Title VII plaintiff has met her burden of showing that the defendants' reasons are pretexts. *See Furnco,* 438 U.S. at 580; *Loeb,* slip op. at 17 n. 14. We think that it was open to the court to conclude from the totality of the evidence that the reasons given for Sweeney's nonpromotion in 1974-75 were implicitly influenced by the fact that Sweeney was a woman.[7] (E-11-12)

The Court discounted the defendants' claim regarding lack of discriminatory animus on the part of the decision makers, saying:

> Although there was no direct evidence, we think that the district court could have inferred that FEAC and Dr. St. John were sex biased in light of the nature and weakness of the reasons given for her non-promotion coupled with the evidence of the statistical composition and general character of the institution and of the insensitivity of many—including St. John—to the concerns of the female faculty. (E-12-13)

In short, the Court of Appeals concluded that sex bias formed a built-in headwind, impeding Dr. Sweeney's promotion, and found that "Sweeney would have been promoted had she been evaluated against the standard that was applied generally to men." (E-14)

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[7] The first decision of the Court of Appeals contained additional language not repeated in the second opinion. It made the following statement based on *McDonnell Douglas* concerning the plaintiff's burden of showing pretext:

> In suggesting the kinds of evidence which would be relevant in proving that the employer's refusal to rehire was a pretext, the Court listed an employer's general policy and practice with respect to minority employment, prior treatment of the plaintiff, and statistics. 411 U.S. at 804-05.

The Court of Appeals then evaluated plaintiff's statistical evidence showing that a double standard existed at the college, excluding women from the upper faculty ranks; took note of the inactivity of the so-called Affirmative Action Program at the college and the program coordinator's lack of concern for Dr. Sweeney's complaints; and reviewed testimony of expert and lay witnesses regarding sex bias and treatment of women on campus.

Argument

I. CERTIORARI SHOULD BE DENIED BECAUSE THIS CASE HAS NOW BEEN RECONSIDERED IN THE LIGHT OF *Furnco Construction Corp.* v. *Waters* AND NO NEW SIGNIFICANT LEGAL ISSUES HAVE BEEN RAISED BY THE OPINIONS BELOW.

a. *The "Clearly Erroneous" Test For Reviewing A District Court's Findings Was Impliedly Approved By* McDonnell Douglas v. Green *and* Furnco Construction Corp. v. Waters, *It Is Used Consistently By The Circuits In Evaluating The Evidence In Individual Title VII Claims And Petitioners Present No Compelling Argument For Abandonment Of This Standard Of Review In Favor Of De Novo Review.*

The defendants continue to be dissatisfied with the finding in this case that the plaintiff would have been promoted but for her sex and now have proposed that the widely-adopted "clearly erroneous"[8] standard of appellate review should not be applied to Title VII claims. Defendants' position is without merit. The "clearly erroneous" rule was employed in *McDonnell Douglas* and *Furnco,* was followed throughout the history of the instant case, and has been almost universally observed by the Circuits, including the Fifth and Seventh, in evaluating the claims of individual plaintiffs in Title VII actions. The defendants present no persuasive reasons for this Court's imposition of a less appropriate standard of *de novo* review.

Both *McDonnell Douglas* and *Furnco* reached the Supreme Court on the "clearly erroneous" standard of review. *See Green* v. *McDonnell Douglas Corporation,* 463 F.2d 337 (8th Cir. 1972); *Waters* v. *Furnco Construction Co.,* 551 F.2d 1085 (7th Cir. 1977). This Court announced rules concerning the order and allocation of proof for individual Title VII claims in the *McDonnell Douglas* and *Furnco* cases, but significantly did not suggest anything but that the "clearly erroneous" standard of review was appropriate once the correct rules of law were applied to the facts as found. The defendants in this case did not question the standard of review until the second appeal of the District Court's decision. (Reply Brief for Defendants-Appellants, at 8-11) Although this Court directed the Court of Appeals to reconsider the facts in this case in the "light of *Furnco*" (A-2) it specifically expressed "no view" regarding the outcome of the case once the correct rule of law had been applied to the facts (A-2, n.1) and impliedly approved the "clearly erroneous" standard of review employed by the First Circuit in its first decision. 569 F.2d at 176, n. 12.[9]

Additionally, the "clearly erroneous" standard of review has been explicitly or implicitly followed in academic tenure or promotion decision cases similar to the one at hand. *See, e.g., Faro* v. *New York University,* 502 F.2d 1229 (2nd Cir. 1974); *Green* v. *Bd. of Regents of Texas Tech Univer-*

[8] FED. R. CIV. P. 52(a) provides in part:

> Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

[9] When this case was before the Court of Appeals for a second time, upon remand by this Court, it was in a posture identical to that of *McDonnell Douglas* upon remand, when the Court of Appeals said:

> In effect the Supreme Court, in view of the employer's statement as to its reason for discharge, stated that the employer had satisfactorily offered rebuttal evidence to the prima facie case and that the remaining issue . . . was whether the employee could demonstrate that petitioner's assigned reason was pretextual or discriminatory in its application. The issue on remand was factual and quite narrow. We are bound by the "clearly erroneous" standard found in Fed. R. Civ. P. 52(a). *Green* v. *McDonnell Douglas,* 528 F.2d 1102, 1104 (8th Cir. 1975).

sity, 474 F.2d 594 (5th Cir. 1973) (suit under § 1983); *cf. Powell* v. *Syracuse University,* 580 F.2d 1150, 1156 (2nd Cir. 1978). Other plaintiffs claiming discrimination, including those bringing actions under Title VII, have seen their fortunes rise or fall under the "clearly erroneous" standard of re iew. *See, e.g., Duckett* v. *Silberman,* 568 F.2d 1020 (2nd Cir. 1978); *Kirkland* v. *New York State Dept. of Correctional Services,* 520 F.2d 420 (2nd Cir. 1975), *cert. denied,* 429 U.S. 823, 50 L.Ed.2d 84, 97 S.Ct. 73 (1976); *Simmons* v. *Schlesinger,* 546 F.2d 1100 (4th Cir. 1976) (withdrawn from reporter at request of court); *Jones* v. *Pitt County Bd. of Ed.,* 528 F.2d 414 (4th Cir. 1975); *Alexander* v. *Aero Lodge No. 735, Intern. Assoc. of Machinists and Aerospace Workers, AFL-CIO,* 565 F.2d 1364 (6th Cir. 1977), *cert. denied,* 436 U.S. 946, 56 L.Ed. 787, 98 S.Ct. 2849 (1978); *Anderson* v. *Methodist Evangelical Hospital, Inc.,* 464 F.2d 723 (6th Cir. 1972); *Middleton* v. *Remington Arms Co.,* 594 F.2d 1210 (8th Cir. 1979); *Harmon* v. *May Broadcasting Co.,* 583 F.2d 410 (8th Cir. 1978); *Clark* v. *Mann,* 562 F.2d 1104 (8th Cir. 1977); *Smallwood* v. *National Car Co.,* 583 F.2d 419 (9th Cir. 1978); *Verzosa* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 589 F.2d 974 (9th Cir. 1978); *Silberhorn* v. *General Iron Works Co.,* 584 F.2d 970 (10th Cir. 1978); *Olson* v. *Philco-Ford,* 531 F.2d 474 (10th Cir. 1976).

The defendants cite *Causey* v. *Ford Motor Company,* 516 F.2d 416 (5th Cir. 1975) and *Stewart* v. *General Motors Corporation,* 542 F.2d 445 (7th Cir. 1976), *cert. denied,* 433 U.S. 919, 53 L.Ed.2d 1105, 97 S.Ct. 2995 (1976), in an attempt to show "disharmony" in the circuits. That is not a correct statement as to *individual, disparate treatment claims* under Title VII.

In the Fifth Circuit, where (as in the present case) there is a conflict in testimony involving an *individual* litigant, the District Court's findings of discrimination or non-discrimination will be considered essentially as fact questions protected under the Rule 52(a) rationale, while conclusions regarding a *class* of litigants may be considered as conclusions of law not subject to the "clearly erroneous" rule. *See United States* v. *Jacksonville Terminal Co.,* 451 F.2d 418, 423-24 (5th Cir. 1971), *cert. denied,* 406 U.S. 906, 31 L.Ed.2d 815, 92 S.Ct. 1607 (1972); *Bolton* v. *Murray Envelope Corp.,* 493 F.2d 191, 194 (5th Cir. 1974); *Cupples* v. *Transport Insurance Company,* 498 F.2d 1091, 1093 (5th Cir. 1974). ("In suits alleging discrimination in employment practices as to identified individuals, findings of fact by district courts may be set aside only if unsupported by substantial evidence"); *Smith* v. *Fletcher,* 559 F.2d 1014 (5th Cir. 1977); *Barnes* v. *Jones County School Dist.,* 575 F.2d 490 (5th Cir. 1978); *Armour* v. *City of Anniston,* 597 F.2d 46, 48 (5th Cir. 1979); *cf. James* v. *Stockham Valves & Fittings Co.,* 559 F.2d 310 (5th Cir. 1977), *cert. denied,* 434 U.S. 1034, 54 L.Ed.2d 781, 98 S.Ct. 767 (1978). The earlier (1975) *Causey* case relied upon so heavily by the defendants is not really outside this rule. In the context of the case itself, the purported distinction between "subsidiary" findings and the "ultimate" finding of discrimination is misleading, since, to the extent the Court of Appeals overturned the District Court, the decision turned on a *legal question*: whether the defendant's evidence adequately rebutted the plaintiff's prima facie case of discrimination under *McDonnell Douglas.* The *Causey* case is consequently of little precedential value.

Stewart v. *General Motors Corporation, supra,* also is not illustrative of conflicts in the circuits that would have bearing on the outcome of an individual disparate treatment case. *Stewart* was a *class action* involving the allegedly discriminatory *impact* of the defendant corporation's hiring and promotional practices. The Court of Appeals reviewed the essentially uncontradicted statistical evidence

to determine its conformity with applicable legal principles drawn from *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 28 L.Ed.2d 158, 91 S.Ct. 849 (1971). In that light, and in that light alone, the determination of discrimination against a *class* may be "as much a conclusion of law" subject to "independent examination."[10] 542 F.2d at 449. However, the Seventh Circuit has joined other circuits in observing the "clearly erroneous" standard of review in connection with identified individuals making civil rights claims. *Moore* v. *Townsend*, 525 F.2d 482 (7th Cir. 1975); *Haythe* v. *Decker Realty Co.*, 468 F.2d 336 (7th Cir. 1972).

Even if, contrary to the plaintiff's position, there is disunity in the circuits, the "clearly erroneous" rule of Rule 52(a) is the correct test for resolution of what is in essence a *credibility* issue: whether the personality reasons advanced by the defendants were the real reason for her non-promotion. There is no longer a question of the legal rule to be applied to the District Court's findings and the defendants have succeeded in directing the Court's close attention to the conflicting testimony between the defendants' witnesses from the administration and the plaintiff's witnesses regarding personality factors. What remains, then, is basically an issue of fact. As the Court of Appeals said:

> [The District Court's] opportunity for first hand observation may be especially important [in a discrimination case] such as this, where the issue of whether "personality" reasons were sexually biased. (E-4, n. 2)

The "clearly erroneous" test is therefore appropriate to the consideration of this case and no cases cited by the defendants change that result.

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[10] The Court's procedure is the equivalent of that of the Court of Appeals in this case, where the Court, reviewing the record for the second time, said it would look closely for "infection" from application of wrong legal principles. (E-4, n.2)

b. *The Defendants Cannot Be Heard To Complaint That The District Court Made No Additional Findings.*

The defendants' next argument is in essence that the terms of this Court's remand for reconsideration of the case in the "light of *Furnco*" have been evaded. The defendants are principally disturbed that the District Court made no additional findings upon remand by the Court of Appeals. The fact of the matter is that the defendants made no request for a hearing or other proceedings, submitted no request for findings or rulings and had no meaningful communication with the District Court for the entire time the case was before it the second time. Defendants' requests for relief (App. 8; App. 19) were properly denied by the District Court as too late. (D-1) The District Court's second opinion, correcting the error made in the first concerning the second and third stages of proof, satisfied the obligation imposed by the Court of Appeals' remand.

Upon a second appeal to the Court of Appeals, that Court subjected the entire record to a *McDonnell Douglas–Furnco* analysis. The correct methodology for reviewing the quantum and nature of proof has now been applied, the defendants have been pointed to evidence meeting the third phase, "pretext" requirement and the terms of this Court's remand have been completely satisfied.

c. *The Quantum And Nature Of Proof Applicable To An Academic Non-Promotion Claim Are Established In* McDonnell Douglas v. Green *And* Furnco Construction Corp. v. Waters, *And Have Now Been Appropriately Applied In This Case; Defendants Present No Compelling Reasons For Departing From That Standard In This Case And Requiring Direct Evidence Of Discriminatory Intent.*

Defendants' last argument is really an attempt to create confusion regarding the quantum and nature of proof in a

Title VII context where actually none exists. Additionally, it is to set up an evidentiary "Catch 22" in Title VII academic promotion cases that foredooms potential litigants to defeat. Although the defendants have concluded that plaintiffs need not (and indeed in most instances cannot) prove discrimination through direct evidence (Brief for Defendants-Appellants, at 25-26), the final argument in their brief appears to take the position that anything but direct evidence is mere "societal bias," which, no matter how closely linked to the decision in a plaintiff's case, can never rise to the level required to show the decision at issue was sexually premised. (*See* Pet. for Cert., at 22-34)

The obvious effect of defendants' argument would be to reduce the 1972 amendments to Title VII to a toothless tiger, in contravention of congressional intent. As the Court observed in *Davis* v. *Weidner*, 596 F.2d 726, 731 (7th Cir. 1979):

> Congress did not intend [higher education to be immunized from the requirements of Title VII]. In fact, in 1972 Congress deleted an exemption for institutions of higher education which was contained in the original equal employment opportunity legislation. *Compare* Pub. L. 88-352 § 702 (1964) *with* Pub. L. 92-261 § 3, 42 U.S.C. § 2000e-1. And the legislative history underlying this amendment reflects Congress' concern with the problem of discrimination against women in academia. *See, e.g.*, H. Rep. 92-238, 92d Cong., 2d Sess., reprinted in [1972] U.S. Code Cong. & Admin. News at 2137, 2155. *See also Sweeney* v. *Board of Trustees of Keene State College*, 569 F.2d 169, 175 nn. 10, 11 (1st Cir. 1978). Congress must have recognized that in order to achieve its legislative goals, courts would be forced to examine critically university employment decisions. *See also, Powell* v. *Syracuse University*, 580 F.2d 1150, 1154 (2nd Cir. 1978).

Defendants cite this Court to a series of decisions which purport to show greater deference to university decisions about faculty members than either the *Davis* or the *Powell* cases prescribe. *Faro* v. *New York University*, 502 F.2d 1229 (2nd Cir. 1974), is highlighted by the defendants as support for a supposed lack of clarity and consistency in the degree to which college review committees will receive judicial scrutiny. However, the *Powell* court specifically questioned other courts' interpretations of its earlier *Faro* decision, saying courts *should* take an activist role in Title VII cases. 580 F.2d 1153. Nor is it appropriate to this inquiry for the defendants to direct this Court to non-Title VII cases cited in the *Powell* decision, which raised constitutional or other statutory claims in tenure and dismissal settings. *See, e.g., Stebbins* v. *Weaver*, 537 F.2d 939 (7th Cir. 1976), *cert. denied*, 429 U.S. 1041, 50 L.Ed.2d 753, 97 S.Ct. 741 (1977); *Megill* v. *Board of Regents of the State of Florida*, 541 F.2d 1073 (5th Cir. 1976). If those cases show a naive faith in the motivation of college administrators, they are not an apt model for review of campus sex bias, which has been termed " 'truly appalling,' 'gross' and 'blatant.' " 580 F.2d at 1154. Particularly is that so where the subjective nature of the decisions invites subtle (though not necessarily "unconscious") forms of prejudice, calling consequently for greater, not lesser judicial probing. *See Davis* v. *Weidner, supra*, 596 F.2d at 731.

The defendants say they are "entitled to know the standard of discriminatory motive against which peer employment decisions will be judged." (Pet. for Cert. at 23-24) The answer of course lies in a disparate treatment analysis under *McDonnell Douglas* and *Furnco*; a violation of Title VII occurs when impermissible disparate treatment is found. As the Court said in *Furnco*:

> The central focus of the inquiry in a case such as this is always whether the employer is treating "some people less favorably than others because of their race, religion, sex or national origin." 438 U.S. at 577, *quoting Teamsters* v. *United States,* 431 U.S. 324, 335 n. 15, 52 L.Ed.2d 396, 97 S.Ct. 1843 (1977).

To prevail in a disparate treatment case, a plaintiff must do more than show that impact of allegedly non-discriminating practices fall more harshly on her class, *Teamsters* v. *United States, supra,* 431 U.S. at 335, n. 15; she must demonstrate that the discrimination was based upon illegitimate, rather than legitimate reasons and that the reasons, if any, given by the employer, are mere "pretexts" for a sexually premised decision. The three-step *McDonnell Douglas – Furnco* methodology is well-suited to this inquiry. On the other hand, direct evidence of discriminatory animus is not required, *see Johnson* v. *University of Pittsburg,* 359 F.Supp. 1002, 1007 (W.D. Pa. 1973); motivation can be determined from inferential evidence, such as statistics, the employer's general policies regarding the employees in the plaintiff's protected class, treatment before and after the plaintiff's complaint of discrimination, and an evaluation of the credibility of defendants' "reasons" for the decision. *See McDonnell Douglas* v. *Green, supra,* 411 U.S. at 804-05; *see also Furnco* v. *Waters, supra,* 438 U.S. at 579-80; *Teamsters* v. *United States, supra,* 431 U.S. at 335, n. 15. This is a clear mandate to meet plaintiff's ultimate burden through inferential and circumstantial proof.

The above-cited principles from *McDonnell Douglas* and *Furnco* have been used to prove an employment discrimination case under Title VII as recently as last month, where the District of Columbia Circuit Court of Appeals suggested in *Davis* v. *Califano,* 21 FEP Cases 273 (D.C. Cir. 1979) that statistical analysis was relevant to a showing of intent to discriminate and that close judicial scrutiny was indicated where subjective promotional criteria could easily mask an "unlawful bias":

> Appellant's statistical data included in category number two also constitutes probative evidence from which discriminatory intent might be inferred. Absent discriminatory promotion practices, similar promotion rates for male and female employees in the higher job classifications and grade levels who possess the minimum objective qualifications necessary for those positions would be expected. Dr. Davis' statistical evidence indicated that male GS employees in the higher grades in NIH and NHLBI were promoted at a substantially higher rate than similarly situated female employees.
>
> Appellant's statistical prima facie case is bolstered by the subjective and ad hoc nature of Appellee's promotion decisions. . . . This Court agrees with the Eighth Circuit Court of Appeals in *Rogers* v. *International Paper Co.,* 510 F.2d 1340, 10 FEP cases 404 (8th Cir. 1975), *vacated on other grounds,* 423 U.S. 809, 11 FEP Cases 576 (1975), *reinstated with modification on other grounds,* 526 F.2d 722, 11 FEP Cases 1000 (8th Cir., 1975), which stated:
>
> > Greater possibilities for abuse . . . are inherent in subjective definitions of employment selection and promotion criteria. . . . [I]t is especially important for courts to be sensitive to possible bias in the hiring and promotion process arising from such subjective definition of employment criteria.

> Appellee's promotion procedures are highly suspect and must be closely scrutinized because of their capacity for masking unlawful bias.[11]

These principles cut a clear path of proof through the thicket that defendants try to create by reference to *Washington* v. *Davis*, 426 U.S. 229, 48 L.Ed.2d 597, 96 S.Ct. 2040 (1976). (Pet. for Cert. at 29-31) The *Washington* case was a class action brought by black police officers challenging the validity of a written personnel test. Plaintiffs alleged that the test discriminated against them by excluding disproportionately large numbers of their group. The case was brought under constitutional and Title VII theories. The Court's discussion, quoted out-of-context in defendant's brief, is simply to the effect that intent must be shown

[11] *See also Jones* v. *Trailways Corp.*, 20 FEP Cases 1541, 1544 (D.D.C. 1979):

> When faced with an employer's reasons for its allegedly discriminatory treatment, plaintiff in a Title VII action ordinarily must rely on circumstantial rather than direct evidence from which to infer racial motivation. *Sweeney* v. *Board of Trustees of Keene State College*, 569 F.2d 169, 16 FEP Cases 378 (1st Cir. 1978), *vacated on other grounds*, 439 U.S. 24, 47 LW 3330, 18 FEP Cases 520 (Nov. 13, 1978); *Marquez* v. *Omaha District Sales Office*, 440 F.2d 1157, 1162, 3 FEP Cases 275 (10th Cir. 1971); *Sawyer* v. *Russo*, 19 EPD ¶ 8996, 19 FEP Cases 44 (D.D.C. 1979). Such racially discriminatory purpose must play some part in the challenged actions, but plaintiff need not prove it played the only part or even the controlling one. See*McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273, 285, 12 FEP Cases 1577 (1976); *Berio* v. *EEOC*, 18 EPD ¶ 8847, 19 FEP Cases 168 (D.D.C. 1979). See also *Arlington Heights* v. *Metropolitan Housing Corp.*, 429 U.S. 252, 265-66 (1977); *Miller* v. *Poretsky*, 595 F.2d 780, 788 (D.C. Cir. 1978). A court may conclude that discriminatory intent was present if plaintiff has shown a pattern or series of actions not explainable on other grounds, see *Arlington Heights, supra* at 266; or if comparably situated white employees were treated differently from plaintiff, *McDonnell Douglas, supra* at 804, or even from the circumstances of plaintiff's treatment combined with more general evidence on defendant's relevant minority employment practices. *Id.* at 804-05.

(although it may sometimes be inferred from disparate impact) under the constitutional basis for the claim but not under the Title VII, disparate *impact* theory under *Griggs* v. *Duke Power Co., supra*, 401 U.S. 424. All of the statements can be harmonized with the view that intent must be shown, but may be shown inferentially—among other ways through unexplained differences in impact—in disparate treatment claims under Title VII. The confusion noted by the defendants' brief, is artificially created.

The fact is that there is no longer a legitimate legal argument in this case. Defendants are simply left with their unsupportable contention that the plaintiff did no more than demonstrate "unconscious societal bias." (*E.g.*, Pet. for Cert. at 33) Her evidence that the non-promotion decision was sexually premised fully met the rigorous *McDonnell Douglas – Furnco* criteria. In summarizing only a part of this evidence:

1. Dr. Sweeney presented evidence that the New Hampshire Commission for Human Rights and the Equal Employment Opportunity Commission both found probable cause for her complaint of discrimination. (App. IV 121, Exs. 53, 54)

2. She presented impressive statistical evidence of sex discrimination in hiring, promotion and salaries in the highest academic ranks. (Exs. 58 and 59; F-23)

3. She presented evidence of the ineffectiveness of the affirmative action program, *see Johnson* v. *University of Pittsburg*, 359 F.Supp. 1002 (W.D. Pa. 1973), and the lack of assistance and concern on the part of the program coordinator in pursuing her claim; in fact, the program coordinator sought to intimidate the plaintiff with answering interrogatories from the New Hampshire Commission for Human Rights, regarded the contention of discrimination as frivolous, and

sought assistance from a colleague in repressing the "form of anarchy" represented by Dr. Sweeney's claims of discrimination. (F-17, 19)

4. An expert testified as to the pattern of discrimination at the university and that it had an impact on promotional decisions of females in general and the plaintiff in particular. (App. III 249; F-21)

5. Other witnesses testified that Dr. Sweeney was among the top third of full professors at Keene and qualified for promotion by objective measurement of teaching ability, publications, and committee work; they testified that she was not rigid and old-fashioned or had trouble working with people as portrayed in the defendants' "explanation." (F-19)

6. The "personality" reasons given for non-promotions are not those stated in the Faculty Maual. (App. II 113; App. III 117; App. III 143; App. III 213; App. III 99)

7. The Court of Appeals' examination of the record elicited additional facts that support an inference of bias on the part of the plaintiff's department chairman. (E-12-13, n. 12 and n. 13)

8. Additionally there was evidence of animosity, which inferentially could have been sexually premised, on the part of specific individuals, including Dean Davis (F-4-5), and Dr. Quirk, head of the FEAC. (App. III 372-73)

9. The "personality" reasons eventually developed by the administration, since untrue, support an inference that the 5-man FEAC and administration saw her as a sexual stereotype, and that sex bias, not personality was the premise of the decision.[12]

[12] *See Hill* v. *Nettleton*, 455 F.Supp. 514 (1978):
Those in authority saw Mary Alice Hill more as a symbol of her sex than as a member of the faculty and she suffered from that perception. It resulted in her being treated less favorably because of her sex and that is a violation of the law. *Furnco Construction Corporation* v. *Waters*, 455 F.Supp. at 519.

10. The finding by the FAC that Dr. Sweeney had been unprofessionally treated by the administration by refusing to explain her non-promotion adds weight to her claim of discrimination. (F-12)

11. The record as summarized by the District Court shows a sequence of events indicative of an intent to discriminate and a fertile factual setting for the view that the "reasons" were what *McDonnell Douglas* terms "a coverup for a [sexually] discriminatory decision," 411 U.S. at 805; no meaningful explanation for the non-promotion decision, followed by a complaint of discrimination, followed by development of an "explanation" by the Dean, head of the FEAC and President of the College for the previously unexplained action, followed by promotion with unchanged credentials or personality. (*E.g.*, F-10, Ex. 32, F-16, E-9) *Cf. McDonnell Douglas Corp.* v. *Green, supra,* 411 U.S. at 804.

The cumulative effect of this evidence and other evidence in the record properly was that Dr. Sweeney was denied a promotion because of her sex, the critical determination in this case.

Conclusion

The legal issues in this case were resolved with the Court's remand, the terms of which have been satisfied by the District Court and met by the Court of Appeals in its complete review of the record.

The defendants raise only a factual dispute regarding the outcome of this case. The Rule 52(a) "clearly erro-

neous'' standard of review is well-settled for Title VII disparate treatment claims, as is the rule that a plaintiff may meet her ultimate burden through inferential forms of evidence.

The respondent requests that the Petition for Certiorari be denied.

Respectfully submitted,

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